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NAVAL POSTGRADUATE SCHOOL Monterey, California



THESIS

**ANALYSIS OF GENERAL ACCOUNTING OFFICE BID
PROTEST DECISIONS ON A-76 STUDIES**

by

Paul Russial

June 2003

Thesis Advisor:
Second Reader:

Jeffrey R. Cuskey
Peter P. Russial, Jr.

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**ANALYSIS OF GENERAL ACCOUNTING OFFICE BID PROTEST
DECISIONS ON A-76 STUDIES**

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF SCIENCE IN CONTRACT MANAGEMENT

from the

**NAVAL POSTGRADUATE SCHOOL
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ABSTRACT

The Department of Defense continues to aggressively pursue A-76 competitive sourcing targets set by the Office of Management and Budget. As more A-76 acquisitions are processed, it is imperative that these studies are conducted fairly and efficiently. Legal challenges to A-76 actions disrupt the process and have a negative impact on the organizations and people undergoing study. Historically, industry has successfully protested a high percentage of A-76 procurements. This thesis examines General Accounting Office A-76 bid protest decisions issued between 5 February 1996 and 23 December 2002. The cases and protest issues are analyzed to determine the reasons that A-76 protests were lodged, and the reasons that A-76 protests were lost by the Government. The thesis identifies common themes, trends, and key issues, and draws conclusions based on that information. Recommendations for A-76 process improvements are developed and provided. It is the researcher's hope that this thesis will be of benefit to A-76 personnel, particularly to Government acquisition personnel responsible for conducting A-76 competitions in the future.

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I. INTRODUCTION

A. AREA OF RESEARCH

This thesis examines General Accounting Office (GAO) protest decisions on Government A-76 Competitive Sourcing Studies. These GAO cases will be examined for trends, key issues, and common themes. This analysis may enable the development of both preventive acquisition strategies to avoid future problems, as well as improved techniques and suggestions related to contracting, source selection, and the Government versus contractor cost comparison decision.

B. METHODOLOGY

The primary source documents are the GAO decisions themselves, gathered from GAO's web site, which posts all bid protest decisions rendered by the agency. Several other Navy and Department of Defense (DoD) data sources will be used to cross-reference the identification of the cases, to insure that all A-76 protests are captured and examined. This examination will be limited to GAO A-76 decisions issued between February 5, 1996 and December 23, 2002.

The researcher will provide background information, including a discussion of the basics of the A-76 process and the A-76 protest process. The Office of Management and Budget's (OMB's) new proposed A-76 process will also be discussed. The results of a literature search will be presented, addressing industry and Government concerns and issues related to the conduct of A-76 studies.

The researcher will group the GAO case data by use of a number of different parameters, including the identity of the buying agency/agency under study, the type of study, and other factors. After arraying the data in this fashion, the Government buying agency's protest "win rate" will then be applied across the same groupings. The main idea is to examine whether (e.g.) the Government's win rate is related to who conducted the study (Army vs. USAF vs. Navy), study type, etc.

The data will be further examined by grouping the issues challenged in the protests by general topic or area. The topical groupings will be derived via an initial examination of the protests. The issues in each topical area will then be analyzed.

As a result of this analysis, the researcher will provide short- and long- term recommendations, and will suggest areas of further research.

C. KEY PROBLEM

A-76 studies engender a significant number of protests. For example, between 1995 and 2000, DoD conducted 286 studies. [Ref. 54 p. 4] During that same period, this thesis identifies 21 protests lodged. Thus, more than seven percent of those A-76 acquisitions were protested. Any protest, whether successful or not, creates disruption in the acquisition process, causes a loss of time and money spent litigating the issues, and often damages Government-contractor relationships, at least for a time. Further, if a protest is lost, further time, effort, and funds are utilized to correct the problem, re-do portions of the acquisition, or take other remedial action. In many cases, the Government is delayed in providing the supply or service to the end-user.

D. POLICY AND OPERATIONAL CONSIDERATIONS

The problems associated with any protest are magnified in A-76 acquisitions. In addition to the normal stakeholders in a procurement, that is, the offerors, contracting office, end-user, and many other support entities (e.g. Government counsel, Defense Contract Audit Agency, etc.), in an A-76 study Government employees' jobs are on the line. The employee stress involved in being announced for study, observing the conduct of the study (such as data collection involving his or her own duties), and working through this period at a normally productive level, is significant. These stresses are greatly magnified if a study is delayed, a favorable decision (to the employees) is overturned, or if the contracting officer is forced to re-do various steps in the acquisition process. Any steps taken to improve or streamline the study process, including avoidance or successful defense of protests, will pay dividends in decreased Government time, effort, and costs, and in increased employee morale.

E. RESEARCH QUESTIONS

The primary and subsidiary research questions that will be investigated are as follows:

Primary Research Question: What common issues and trends are contained in GAO A-76 bid protests, and what acquisition planning and process actions may be taken to alleviate future problems?

Subsidiary Research Questions:

1. How numerous are the GAO protests lodged against A-76 studies?
2. What are the underlying causes of these protests, and what factors affect the success or failure of the protests?
3. What are the common issues, themes, or trends associated with these protests?
4. What acquisition planning and process actions may be taken to alleviate future problems, particularly in light of the new OMB procedures?

F. ASSUMPTIONS

The main assumption at the beginning of the research is that certain patterns of issues, common themes, or problems with A-76 acquisitions will emerge. The researcher's hope is that the many different protest issues can be rationally grouped, and can therefore be examined empirically, rather than just in an anecdotal fashion. Grouping in some manner would then allow an examination of the underlying causes for A-76 protests, and the reasons that these protests are often lost. Most importantly, if common underlying problems could be identified, it might be possible to suggest preventive or corrective actions to avoid some future protests, or increase the chances of a successful Government defense against challenges, should they occur.

Another assumption at the outset is that some of the A-76 protests will cover more than one issue within a single protest action/decision. Thus, there may be more issues than protests. The researcher ultimately will examine the protests on an issue-by-issue basis.

A third assumption is that the reader will be generally familiar with the basics of the defense acquisition process.

G. LIMITATIONS

This thesis examines General Accounting Office (GAO) bid protest decisions on acquisitions conducted under, or related to, Office of Management and Budget (OMB) Circular A-76. Circular A-76 and its implementing policies and procedures provide for conducting competitions to determine whether it is more economical to perform certain services in-house with Government personnel, or by use of a contractor to provide those services.

Legal challenges lodged against A-76 competitions are not in fact limited to GAO bid protest procedures. Other venues for protest or objection include protests directly to the buying/contracting activity or agency, action in the U.S. Court of Claims or the various Federal District Courts, or formal A-76 appeals to the administrative appeal authority identified for each study. However, the most useful analysis is to examine the GAO cases. Very few actions are lodged in the U.S. Court of Claims or the various Federal District Courts. [Ref. 51 p. 69] Many challenges initially lodged with the administrative appeal authority end up being heard at GAO. Meaningful information and analysis is thus possible from an examination of the GAO decisions alone. Further detail on the specific role of GAO within this framework is provided below.

Another limitation is the quality of the narrative and the amount of detail provided in the GAO decisions themselves. Information regarding offerers' technical and price proposals, the Government's source selection strategies and pricing structure, and a number of other important details must be gathered from the GAO written decisions. Missing information or lack of detail could limit the value of the analysis, and/or render the analysis more difficult.

H. DEFINITIONS

A-76 – The government's policy that defines procedures for determining whether a service is performed more economically in-house by Government employees, or by use of a contractor.

Competitive sourcing – Term used within Government to describe the A-76 competitive process.

Contracting Officer – Government official with primary responsibility for conducting the acquisition portions of an A-76 study. Includes market research and advertising, solicitation, closing, evaluation of private sector offers, source selection, and assistance in evaluation of Government proposal.

Cost comparison – The overall acquisition/study process by which the best contractor proposal is selected, and then compared against the Government proposal, to determine which is more economical. More narrowly, that step in the process in which the selected potential contractor's cost is compared to the Government's cost.

Direct conversion – Award of a contract using “traditional” methods, i.e. the Government does not prepare a formal proposal. Generally is used after an initial estimate determines that contracting would be more economical. There are specific limitations on use of this procedure in OMB and DoD policies.

Full study – A formal A-76 process in which competitive contractor proposals are received and analyzed, a potential contractor is selected, and then the contractor's and Government's costs are compared. This contrasts with a “direct conversion” defined above.

In-House Cost Estimate (IHCE) – The cost/price portion of the Government's response, which provides a price to perform the services, backed by supporting cost documentation.

Management Plan (MP) – Name for the technical portions of the government proposal/response to the A-76 solicitation. (Sometimes refers to both technical and cost portions.)

Most Efficient Organization (MEO) – Portion of the Government's technical response that addresses number, mix, and utilization of staffing required to perform the performance work statement (PWS.)

Outsourcing – Sometimes means the act of acquiring work via contract rather than performing the work in-house. This term was previously used within Government to describe the A-76 competitive process, but now “Competitive sourcing” is used to describe the A-76 competitive process.

Performance Work Statement (PWS) – The description of required services, including tasks and performance standards, that the Government or contractor must meet.

Source selection – The process of selecting the prospective contractor from among private sector offerors.

Source Selection Advisory Council (SSAC) – The group, sometimes used on more complex procurements, that reviews both technical and price/cost proposals from private sector offerors, and makes recommendations to the Source Selection Authority (SSA).

Source Selection Authority (SSA) – Government official who determines winner of the private sector portion of the competition. Often, but not always, the Contracting Officer.

Source Selection Evaluation Board (SSEB) – The group that analyzes private sector offerors' technical proposals, and makes recommendations to the Contracting Officer or Source Selection Authority (SSA).

Strategic sourcing – Term that encompasses the A-76 process and other techniques such as business process reengineering (BPR).

Technical Evaluation Committee (TEC) – Group that tests and evaluates the technical suitability of material, equipment, or system offered to the Government.

Technical Performance Plan (TPP) – Portion of the Government's technical response that addresses the methods by which the Government intends to perform the PWS requirements.

Transition Plan (TP) - Portion of the Government's technical response that addresses the steps and timeline needed to move from current performance to full implementation of the MEO.

I. **CHAPTER OUTLINE**

The thesis is organized as follows:

Chapter I – Introduction – This chapter identifies the topic, provides an overview of the research to be conducted, describes the importance of the topic, and outlines the goals of the thesis as stated in the principal and subsidiary research questions. It also provides definitions, as well as limitations and assumptions.

Chapter II – Theoretical Background and Literature Search – This chapter will provide background information, including a discussion of the basics of the A-76 process

and the A-76 protest process. It will also contain a discussion of OMB's new proposed A-76 process. The results of a literature search will be presented, addressing industry and Government concerns and issues related to the conduct of A-76 studies.

Chapter III – Presentation of Data – This chapter will present and array the GAO case data.

Chapter IV – Data Analysis – This chapter will analyze the bid protest data as discussed above.

Chapter V – Conclusions and Recommendations – This chapter will include short- and long- term recommendations, answers to the research questions, and suggestions for areas of further research.

J. BENEFITS OF THE THESIS

As discussed below, A-76 targets are still being aggressively pursued. Any recommendations that reduce the likelihood of protests, or increase the likelihood of successfully defending against protests, benefit all the stakeholders. These recommendations may be of particular value to Government acquisition personnel and others in charge of processing A-76 competitions. The thesis has the potential to benefit the researcher's local command, the Fleet and Industrial Supply Center (FISC) Norfolk, as well as the broader Navy, DoD, and Government acquisition community.

K. CHAPTER SUMMARY

This chapter identified the topic, provided an overview of the research to be conducted, described the importance of the topic, and outlined the goals of the thesis as stated in the principal and subsidiary research questions. It also provided definitions, as well as limitations and assumptions.

The next chapter will provide background information, including a discussion of the basics of the A-76 process and the A-76 protest process. It will also contain a discussion of OMB's new proposed A-76 process. The results of a literature search will

be presented, addressing industry and Government concerns and issues related to the conduct of A-76 studies.

II. THEORETICAL BACKGROUND AND LITERATURE SEARCH

A. BACKGROUND

Throughout the twentieth century, federal Government policy has been to use private contractor sources for services readily available in the marketplace. The Office of Management and Budget (OMB) Circular A-76 was issued in 1966, and prescribed federal policies for studying commercial activities and conversion of in-house work to contract. In 1979, OMB issued the Revised Supplemental Handbook (RSH), which set forth specific procedures for conducting cost comparisons between the public and private sector. [Ref. 53 p. 2] The RSH provides for a cost comparison to determine if services that are commercial in nature may be performed more economically by Government employees or by a contractor. Some functions are considered “inherently governmental” and are therefore exempt from A-76 competition. These functions require the exercise of discretion or involve decision-making on behalf of the Government, and therefore must be performed by Government employees. [Ref. 64 p. 55] There are also exemptions from A-76 policies for functions directly related to national defense or for functions involving direct patient healthcare. [Ref. 64 p. 3]

The Department of Defense (DoD) was active in conducting A-76 studies during the early to mid 1980s. After a hiatus, in 1995 DoD again began to plan and conduct numerous A-76 studies, as a means of saving infrastructure costs. DoD ultimately plans to study nearly 250,000 positions, and achieve over \$11 billion in savings by 2005. [Ref. 53 p. 2] Many civilian agencies are now beginning to conduct A-76 competitions. OMB has tasked the agencies to perform A-76 studies on at least 15% of all commercial in nature positions by the end of fiscal 2003. [Ref. 69]

DoD hopes to utilize A-76 studies to save significant dollars in reduced infrastructure costs. For example, based on DoD’s prior experience with A-76 in the 1980s, the Navy estimated that it could reduce the costs of services an average of 30% over the pre-study costs, whether a contractor or the Government Most Efficient Organization (MEO) was successful. [Ref. 62 p. 17] The program is one way to “right-size” the supporting workforce in an era of tighter dollars, to help pay for critical military

quality of life improvements (pay, benefits, health care, housing, etc.), and to free up scarce dollars for direct production and modernization of weapons systems and platforms.

A-76 studies are also seen as a way to streamline and improve the organic workforce, rather than to simply “contract out” jobs. Exposing the federal workforce to market competition is designed to force the Government to streamline its processes, reorganize its workforce along newer, more efficient lines, and thereby save money without sacrificing the quality of support services. The DoD is still actively planning for hundreds of A-76 studies, covering hundreds of thousands of jobs. President Bush has endorsed the continuation of A-76 studies as a valuable strategy in his administration. The president has set a goal for federal agencies to complete A-76 studies on approximately 425,000 Government positions by the end of fiscal 2004. [Ref. 69]

B. THE A-76 PROCESS

The initial “contracting” portion of the A-76 process is somewhat similar to a normal acquisition, with private firms responding to the Government’s solicitation requirements. However, in an A-76 competition, the Government Management Plan team prepares a response as well. In these A-76 acquisitions, a “winning” private sector offerer is first selected. The private firm is usually selected via competitive procedures, although occasionally preference programs such as the Javits-Wagner-O’Day Act (for single-source direct purchase from a non-profit workshop that employs the disabled) are used.

There are three primary competitive evaluation methods for private contractor source selection that are utilized in A-76 acquisitions. The first is the use of Invitation For Bids (IFB), under the procedures of the Federal Acquisition Regulation (FAR) Part 14. The IFB method is characterized by public opening of priced bids. Contractor selection is made on the basis of the low price received from a “responsible” firm (i.e. a firm that is judged to have sufficient capability, capacity, and finances to perform the contract) that has submitted a bid responsive to the solicitation requirements. The second and third methods both utilize competitive negotiation techniques under the procedures of FAR Part 15. The second competitive method is a negotiated procurement

with selection of a firm based on the low priced technically acceptable offer. This technique allows consideration of selection criteria other than price (e.g. the relevance and quality of a company's past performance on similar contracts), and permits discussions and proposal revisions to correct deficiencies, clarify ambiguities, and improve pricing. To be eligible for selection, a proposal must be determined acceptable in the non-price technical factors included in the solicitation. The third competitive method is use of a negotiated procurement with best value selection based on the firm offering the most favorable combination of price and technical merit. The Contracting Officer determines the relative weight of the technical and price proposals, and the relative weight of factors within the technical proposal, and discloses these weights in the solicitation. For example, the technical proposal can be considered "more important" than price (or "approximately equal", "significantly less important", etc.) Within the technical proposal, various technical factors (e.g. past performance, corporate experience, and personnel staffing plan) can be considered of "equal weight," or the factors could be listed in "descending order of importance," etc. These best value trade-off techniques allow selection of other than the lowest price, using subjective judgment to evaluate various aspects of a firm's technical background and expertise. This third competitive source selection method also permits discussions and proposal revisions to correct deficiencies, clarify ambiguities, and improve pricing. With this maximum flexibility comes an increased risk of challenges from disgruntled losing offerors.

Once the private sector "challenger" is selected, the contracting officer/Source Selection Authority (SSA) turns to an examination of the Government's proposal, known as the Management Plan (MP.) The technical portion of the management plan consists of three parts. The Technical Performance Plan (TPP) addresses the methods by which the Government intends to perform the performance work statement (PWS) requirements. The Most Efficient Organization (MEO) addresses the number, mix, and utilization of staffing required to perform the PWS. The Transition Plan (TP) addresses the steps and timeline needed to move from current performance to full implementation of the MEO. The SSA reviews these documents to insure that the Government's proposal meets the PWS requirements, and to insure that the Government's proposal provides "the same

level of performance and performance quality” as the private sector challenger. [Ref. 64 p. 12]

Many A-76 procurements use the best value trade-off techniques described above to select the private sector challenger, allowing the SSA to select other than the lowest-priced private firm. However, the A-76 procedures then require a low-price decision to select between the contractor and the Government proposals. [Ref. 64] Because the potential exists under best value for the contractor challenger to offer excesses or enhancements above PWS requirements (enhancements which may have increased the firm’s costs), the contractor and Government technical proposals must be examined to insure that they offer the same levels of performance and performance quality. [Ref. 64] If the contractor has higher performance or quality, the SSA must require that the Government Management Plan increase performance to the same levels, and increase its price if necessary as well. In theory at least, this insures a fair price-only cost comparison. The actions of examining the Government and contractor technical proposals, and possible increases on the Government side, are known as “balancing” or “technical leveling”.

After any necessary leveling adjustment, the private sector challenger’s price or cost is then compared to the Government’s price/cost proposal or “In House Cost Estimate” (IHCE.) A number of cost adjustment factors are first applied. Typical cost adjustment factors include: a decrease to the private sector price to account for additional corporate income taxes that will accrue to the Government in the event of a contractor victory; an increase to the private sector price for the Government’s cost of contract administration; and, an increase to the private sector price for “one-time conversion” costs (e.g. severance pay and relocation assistance to displaced federal workers.) In addition, in order to displace an existing Government workforce, the adjusted private sector price must also overcome a “minimum conversion differential” of ten million dollars, or ten percent of the Government’s total personnel costs, whichever is less. [Ref. 64 p. 28] This differential accounts for the non-quantifiable costs and disruption associated with a changeover from a Government workforce to a contracted operation. After application of the cost adjustment factors, the low evaluated price (Government or contractor) wins the competition.

C. THE A-76 PROTEST PROCESS

The GAO protest process under A-76 studies is similar to protests against other non-A-76 procurements. Interested losing parties (usually defined by GAO as those firms with a potential to win a contract or A-76 cost comparison) may file objections to GAO within prescribed time limits. GAO may dismiss the case (e.g. due to untimely filing), or it may elect to hear the case. The protestor and the procuring agency each tell their side of the story, via submission of written documentation, and often via sworn testimony from the various participants. GAO will then rule on the merits of the case. It may deny the protest, thereby supporting the procuring agency's actions and decision. Conversely, it may sustain the protest and support the allegations of the protestor. GAO will then require the procuring agency to take corrective action, often in the form of a re-competition or re-evaluation of proposals. Successful protestors may be able to recover from the Government the legal and administrative costs of filing the protest.

There are some differences unique to A-76 procurements. The A-76 Revised Supplemental Handbook and various implementing agency instructions provide for an "Administrative Appeal Authority" for each A-76 study. [Ref. 64 p. 13] This person/entity is usually created within the overall claimancy for the activity undergoing study, at an organizational level well above that of the activity being studied. The appeal authority is responsible for reviewing challenges to the cost comparison portion of the study, i.e. all aspects leading up to the analysis and outcome of the Government vs. contractor-challenger decision. There are several important ramifications regarding the role of the administrative appeal authority, and its impact on A-76 General Accounting Office (GAO) bid protests. First, GAO has concluded that the Government proposal team does not have standing to protest to GAO. GAO has stated that the Government's proposal is not an offer, no contract will result from a Government A-76 victory, and therefore, the Government proposal team is not an interested party to the acquisition. [Ref. 7] Thus, when the Government initially loses an A-76 competition, it must object to the appeal authority; it cannot protest to GAO.

There are also ramifications for potential contractor/private offeror protests. GAO's initial focus is on the private sector source selection aspects of the A-76

competition. If the protest takes issue with the private sector source selection, GAO will hear the case immediately. On the other hand, if an offeror has an objection to the cost comparison decision of Government vs. contractor-challenger, GAO will normally hear the protest only after an (unsuccessful) appeal to the administrative appeal authority. GAO does then consider these protests, generally only from the selected private sector offeror, because potentially that offeror failed to receive a contract due to alleged errors in conducting the study.

D. A-76 ISSUES AND CONCERNS

There are a number of issues and concerns related to the planning and execution of A-76 studies conducted by the Department of Defense. Congress, industry, employee groups, and DoD all have a stake in the outcomes and results achieved under A-76.

GAO issued a “Lessons Learned” report in July 1999 that addressed a number of key issues and concerns. [Ref. 53] GAO found that use of standardized performance work statements, long considered a solid idea, could actually create problems unless the PWS was carefully crafted to include all site-specific requirements, conditions, workload, and performance parameters. The report also stated that DoD did not do a very good job of disseminating best practices gathered from prior A-76 studies. GAO also found that bundling of various functions into larger studies could achieve savings, but such bundling created barriers to small business participation. [Ref. 53 p. 9] GAO also recommended that DoD use financial tools such as activity based costing (ABC) to better estimate its cost of doing business and the savings realized through A-76. Finally, GAO recognized that DoD needed to take action to decrease the time needed to conduct A-76 studies. [Ref. 53 p. 12] In 2002, GAO issued another report on the continuing problems with A-76. [Ref. 55] The extended lead times to complete studies again were noted. GAO also found that the cost to conduct a study was often underestimated, DoD could not accurately calculate savings achieved, and the task of identifying and grouping functions into individual studies remained challenging.

DoD has been reluctant to embrace aggressive A-76 targets that are set by the Office of Management and Budget. In 2002, DoD stated it did not plan to meet the OMB targets, but instead would use A-76 as only one of a number of strategic sourcing tools to

increase efficiency. [Ref. 71] Nor has industry always embraced the A-76 process. Private firms sometimes feel that the Government uses techniques such as A-76 as a market research tool, with no intent to carry through the competition to completion. [Ref. 60] Companies have also objected to the perception of bias created by participation of Government employees in the A-76 study process who have a stake in the outcome, e.g. managers who oversee the department/s undergoing a study. [Ref. 60]

The Navy has also commented on concerns with the A-76 process. Mr. John Graveen, Director, Navy Strategic Sourcing, has recently written that for the relatively smaller A-76 studies, the cost associated with the defense of a protest often outweighs the savings realized through A-76. [Ref. 58] Graveen also noted the problems and protests related to perceived conflicts of interest in the A-76 study process, leading to a prohibition against Government and support contractor employees participating on both the MEO and PWS teams. [Ref. 58]

E. THE COMMERCIAL ACTIVITIES PANEL

The problems and concerns with the A-76 process led Congress in 2001 to direct the formulation of the “Commercial Activities Panel,” led personally by the Comptroller General of the United States (the head of GAO), Mr. David M. Walker. [Ref. 2] This group was tasked to conduct a review of OMB’s A-76 process, and make recommendations for changes and improvements to the process. Walker pulled together a team of top people from Government, academia, labor, and industry, including: E. C. “Pete” Aldridge, Under Secretary of Defense for Acquisition, Technology, and Logistics; Mark C. Filteau, President, Johnson Controls World Services, Inc.; Kay Coles James, Director, U.S. Office of Personnel Management; Bobby L. Harnage, Sr., National President, American Federation of Government Employees, AFL-CIO; David Pryor, Director, Institute of Politics, Harvard University; and, Angela B. Styles, Administrator, Office of Federal Procurement Policy.

After several public hearings and a number of meetings, the panel issued its report on 30 April 2002. [Ref. 4] The panel found that the current A-76 process did achieve dollar savings. However, the group noted, “...A-76 has not worked well...to identify the best provider in terms of quality...” [Ref. 4 p. 10] The panel concluded that the existing

A-76 process focused primarily on low cost, at the expense of quality. In its report, the group unanimously approved and issued ten “Sourcing Principles” as guidance for the future conduct of A-76 studies. The principles included recognition of certain functions as inherently governmental, stated that competitions should be conducted fairly and efficiently, and recommended that A-76 competitions consider quality and cost factors. The ten principles were short on detail and implementation instructions. For example, the panel report did not provide new insights on how to determine if a position should be categorized as inherently governmental (and thus exempt from exposure to A-76 competition.) [Ref. 2] Rather, the report cited 1992 Office of Federal Procurement Policy (OFPP) language on the subject, ignoring the fact that this and other prior policies had led to continuous difficulties in making inherently governmental determinations. [Ref. 63]

When the panel attempted to develop more specific recommendations, the diversity of the membership, representing a wide variety of interests and constituencies, guaranteed that consensus would be difficult. [Ref. 2] Ultimately, the panel added additional recommendations based on a “supermajority” (two-thirds) vote among panel members. [Ref. 4 p. 49] The supermajority recommendations provided that: the Government would directly compete against all private sector offerors in a technical and price best value trade-off competition based on Federal Acquisition Regulation (FAR) procedures; the Government proposal would be guaranteed a position in the competition’s competitive range (i.e. the Government could not be eliminated without first having an opportunity to revise and improve its offer); and, federal employees would have bid protest rights similar to private sector firms. Some panel members opposed the possibility of the Government competing on a best value trade-off basis with all private firms. Bobby L. Harnage, Sr. (National President, American Federation of Government Employees, AFL-CIO), Colleen M. Kelly (National President, National Treasury Employees Union), David Pryor (Director, Institute of Politics, Harvard University), and Robert M. Tobias (Distinguished Adjunct Professor, American University) all wrote dissenting opinions that were included in the report. [Ref. 4 Section VI]

The Commercial Activities Panel Report recommended implementation of all its proposed changes, and tasked OMB with the development of a new A-76 competition process.

F. THE NEW OMB A-76 PROCESS

On 14 November 2002, OMB issued its draft revision of OMB Circular A-76 for public comment. [Ref. 65] The revised circular contains a number of changes, many of them recommended by the Commercial Activities Panel report. Significant changes include: compressing the allotted time to complete A-76 studies to twelve months (versus the current two-year limit for single function studies and four-year limit for multiple function studies); providing for the direct best value trade-off comparison between the Government proposal and all private offers described above; making the Contracting Officer directly responsible for the PWS team; and, making the Source Selection Authority (SSA) directly responsible for review of all aspects of the Government's technical and cost/price proposals.

Reaction has been mixed. GAO has generally supported the draft revision, but disagrees with the proposed aggressive timeline, and noted the lack of a requirement that an agency carefully align its competitive sourcing policies with the agency mission (a requirement suggested by the Commercial Activities Panel.) [Ref. 56] The twelve-month timeline is particularly problematic, given that OMB has not suggested where the agencies will find the additional resources needed to expedite the process. Some in Congress have also objected to the potential subjectivity of the best value trade-off cost comparison analysis. [Ref. 68] Government employee labor groups, including the American Federation of Government Employees (AFGE), also object to the new cost comparison analysis process. [Ref. 67] Government officials in the Executive Branch have reacted favorably to the process revisions in most cases. [Ref. 61]

DoD has provided formal comments to the draft OMB A-76 revision. [Ref. 66] DoD has recommended that: the new procedures should only apply to A-76 studies announced after the publication date of the new A-76 circular; the timeline be set at eighteen months instead of one year; and, the administrative appeal process be replaced

by allowing an unsuccessful Government Management Plan team to file a bid protest directly with the procuring agency Contracting Officer.

OMB is reviewing these inputs as well as hundreds of other comments, criticisms, and suggestions for changes to the draft A-76 circular. [Ref. 1] Ms. Angela B. Styles, Administrator, Office of Federal Procurement Policy, has stated that the final version of the new A-76 policy will likely be issued in May 2003. [Ref. 70]

The new A-76 circular is not yet in effect. Therefore, no A-76 acquisitions have been conducted under the new procedures. Accordingly, this thesis will collect and analyze protest data generated under the current A-76 process, and will not analyze the effectiveness of the proposed new process.

G. CHAPTER SUMMARY

This chapter provided background information, including a discussion of the basics of the A-76 process and the A-76 protest process. It also discussed OMB's new proposed A-76 process. The results of a literature search were presented, addressing industry and Government concerns and issues related to the conduct of A-76 studies.

The next chapter will present and array the GAO case data.

III. PRESENTATION OF DATA

A. OVERVIEW

The researcher has located 46 General Accounting Office (GAO) bid protest decisions either directly or indirectly related to Office of Management and Budget (OMB) Circular A-76 studies. All but one involve Department of Defense (DoD) acquisitions, as the civilian agencies have not yet conducted a significant number of A-76 studies in the present phase (since 1995.) (The lone exception is *Southwest Anesthesia Services*, in which Southwest alleged that the Department of Health and Human Services' Indian Health Service (IHS) should have conducted an A-76 competition prior to canceling a solicitation and securing services in-house. [Ref. 47]) The researcher has grouped the data by use of a number of different parameters: (1) all GAO A-76 decisions; (2) procuring agency/agency under study; (3) study type (full study, direct conversion, etc.); (4) private sector source selection strategy; (5) year of protest action; and, (6) protest type (award protest or pre-award protest.)

After arraying the data in this fashion, the Government buying agency's "win rate" (see below) is then applied across the same groupings. In the next chapter, the case data will be analyzed to determine whether (e.g.) the Government's protest win rate is related to who conducted the study (Army vs. USAF vs. Navy), study type, etc. The number of cases is small, so the resultant rates may not be scientifically valid from a pure statistics' viewpoint. However, an examination of the win rates by the various parameters may be useful to uncover significant trends.

The data will then be further arrayed by the types of issues protested, with the win rate applied to each issue category. The issue data will also be analyzed in the next chapter, to determine if the types of issues that were contested in the GAO cases affect the win rates. The total number of issues in some of the categories is relatively small. However, by examining the win rates by issue category, the researcher expects to gain insight into trends and problems associated with each category.

B. IMPORTANT NOTE ABOUT “GOVERNMENT WIN RATE”

The terms “Government win rate”, “win rate”, “Government win”, or “win” are defined to mean that the *Government procuring agency successfully won or defended the protest*. These terms do NOT refer to which entity won the A-76 cost comparison, Government or contractor. Even though private sector offerors are the protestors here, a number of the initial cost comparison decisions were originally made in favor of a contractor.

Government protest wins can result from a complete victory (e.g. protest “denied”), or dismissal (e.g. protest filed late). Contractor/offeror wins (i.e. Government losses) can result from a clear victory (e.g. protest “sustained”), or from dismissal. (For example, after seeing the offeror’s arguments, Government procuring activity agrees to re-do the A-76 cost comparison, thus rendering the protest academic. GAO dismisses the protest as academic, but essentially the protestor has won the day at GAO.) [Ref. 30] For these reasons, protests “dismissed” by GAO have been counted as Government wins or losses as applicable, depending on the circumstances surrounding the dismissal.

C. GAO CASE DATA AND GOVERNMENT WIN RATE INFORMATION

The GAO case data is arrayed below using various parameters, showing the total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates.

1. All GAO A-76 Decisions (5 Feb 1996 to 23 Dec 2002)

46 Total	27 Wins	19 Losses	59% Govt. win rate
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2. By Procuring Agency/Agency Under Study

13 USAF	6 Wins	7 Losses	46% Govt. win rate
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17 Navy	10 Wins	7 Losses	59% Govt. win rate
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12 Army	8 Wins	4 Losses	67% Govt. win rate
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1 DLA*	1 Win	0 Losses	100% Govt. win rate
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1 DCA**	1 Win	0 Losses	100% Govt. win rate
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2. By Procuring Agency/Agency Under Study (Con't.)

1 IHS ***	1 Win	0 Losses	100% Govt. win rate
1 DoD****	0 Wins	1 Loss	0% Govt. win rate

(*Defense Logistics Agency/**Defense Commissary Agency/**Indian Health Service/****DoD Pentagon Heating and Refrigeration Plant)

3. By Study Type

There are several methods for conducting an A-76 acquisition set forth in the OMB A-76 Revised Supplemental Handbook (RSH.) A “full study” is a formal A-76 process in which a solicitation is issued, competitive private sector offers are received and analyzed, a potential contractor is selected, and then the contractor and Government in-house costs are compared. The Government prepares a proposal for in-house performance known as the Management Plan. The low evaluated price/cost (either Government Management Plan or contractor) is then selected for performance of the required services. A “direct conversion” is normally used on smaller A-76 competitions, usually those involving ten or fewer civilian positions under study. No solicitation is issued initially, and the Government does not prepare a formal Management Plan. The procuring agency conducts a market survey of existing contract prices for similar work. This range of contract cost estimates is then compared to the estimated Government cost of in-house performance. If the Government cost falls within or below the range of contract costs, performance remains in-house with Government employees. If the Government cost falls above the range of contract costs, a determination is made to convert to contract performance. The contract is then awarded using traditional methods.

The GAO case data is arrayed by study type below.

41 Full study	24 Wins	17 Losses	59% Govt. win rate
2 Non A-76 RFPs*	1 Win	1 Loss	50% Govt. win rate
1 Direct conversion	1 Win	0 Losses	100% Govt. win rate
2 Task Orders**	1 Win	1 Loss	50% Govt. win rate

(*Request For Proposal/**Order under existing contract – The RFPs and task orders were non-A-76 procurements challenged as violations of A-76 policies.)

4. By Private Sector Source Selection Strategy

The “contracting” portion of the A-76 process is somewhat similar to a normal acquisition, with private firms responding to the Government’s solicitation requirements. The private firm is usually selected via competitive procedures, although occasionally sole/single source preference programs such as the Javits-Wagner-O’Day Act (for single-source direct purchase from a non-profit workshop that employs the disabled) are used.

There are three primary competitive evaluation methods for private contractor source selection that are utilized in A-76 acquisitions. The first is the use of Invitation For Bids (IFB), under the procedures of the Federal Acquisition Regulation (FAR) Part 14. The IFB method is characterized by public opening of priced bids. Contractor selection is made on the basis of the low price received from a “responsible” firm (i.e. a firm that is judged to have sufficient capability, capacity, and finances to perform the contract) that has submitted a bid responsive to the solicitation requirements. The second and third methods both utilize competitive negotiation techniques under the procedures of FAR Part 15. The second competitive method is a negotiated procurement with selection of a firm based on the low priced technically acceptable (LPTA) offer. This technique allows consideration of selection criteria other than price (e.g. the relevance and quality of a company’s past performance on similar contracts), and permits discussions and proposal revisions to correct deficiencies, clarify ambiguities, and improve pricing. To be eligible for selection, a proposal must be determined acceptable in the non-price technical factors included in the solicitation. The third competitive method is use of a negotiated procurement with best value selection based on the firm offering the most favorable combination of price and technical merit, also known as trade-off. The Contracting Officer determines the relative weight of the technical and price proposals, and the relative weight of factors within the technical proposal, and discloses these weights in the solicitation. These best value trade-off techniques allow selection of other than the lowest price, using subjective judgment to evaluate various aspects of a firm’s technical background and expertise. This third competitive source

selection method also permits discussions and proposal revisions to correct deficiencies, clarify ambiguities, and improve pricing.

The GAO case data is arrayed by private sector source selection strategy below.

30 Trade-Off	16 Wins	14 Losses	53% Govt. win rate
10 LPTA	8 Wins	2 Losses	80% Govt. win rate
4 IFB	2 Wins	2 Losses	50% Govt. win rate
2 Sole Source*	1 Win	1 Loss	50% Govt. win rate

(*One task order/one single source procurement under small disadvantaged business program)

5. By Year of Protest Action

2 CY* 1996	2 Wins	0 Losses	100% Govt. win rate
1 CY 1997	1 Win	0 Losses	100% Govt. win rate
4 CY 1998	4 Wins	0 Losses	100% Govt. win rate
5 CY 1999	3 Wins	2 Losses	60% Govt. win rate
9 CY 2000	3 Wins	6 Losses	33% Govt. win rate
11 CY 2001	5 Wins	6 Losses	45% Govt. win rate
14 CY 2002	9 Wins	5 Losses	64% Govt. win rate

(*calendar year)

6. By Protest Type

There are two basic types of protests filed at GAO. Pre-award protests generally involve challenges to the Government solicitation specifications, clauses, provisions, or source selection methodology (filed before the deadline for submission of bids or proposals), or else they involve challenges after submission of offers but prior to source selection, most often objections to the protestor's exclusion from the competitive range. Award protests involve challenges to the contractor selection decision, filed by

unsuccessful offerors. In A-76 acquisitions, award protests may also challenge the A-76 Government versus contractor-challenger cost comparison decision, after the protestor first files an (unsuccessful) appeal to the A-76 administrative appeal authority.

The GAO case data is arrayed by protest type below.

37 Award protest	21 Wins	16 Losses	57% Govt. win rate
9 Pre-award protest	6 Wins	3 Losses	67% Govt. win rate

D. ISSUE DATA AND GOVERNMENT WIN RATE INFORMATION

The researcher conducted a brief initial examination of the A-76 bid protests, in order to ascertain what types of issues were contested at GAO. This examination revealed that the issues could be categorized into several topical groupings for the purposes of review and analysis. The issues contested in the A-76 protests will be grouped into five categories.

The first two issue categories are associated with issues related to A-76 acquisitions. “A-76 Process” issues involve the policies and procedures unique to A-76 competitions. For example, in *BAE Systems*, GAO sustained a protest where it found that the procuring agency failed to determine that the Government Management Plan (MP) met the requirements of the performance work statement. In *IT Facility Services-Joint Venture*, GAO denied a protest alleging conflict of interest due to the same support contractor assisting in both the preparation of the Government MP as well as the evaluation of private sector offers. “A-76 Process - Balancing” issues involve the technical leveling or balancing step in the A-76 process (described in Chapter II, Section B.) For example, in *Aberdeen Technical Services*, GAO sustained a protest where it found that the procuring agency failed to consider potential balancing of the Government MP with the private sector challenger firm. In *Integrity Management Enterprises*, GAO denied the protest, stating that the procuring agency thoroughly reviewed the Government MP and private sector challenger technical submissions. (The A-76 Process category does not include the A-76 Process - Balancing issues, or vice versa; they are distinct categories.)

The third and fourth issue categories cover matters not directly related to the A-76 aspects of the acquisitions. “Performance Work Statement (PWS)” issues are those related to the contract performance work statement (sometimes called the statement of work or SOW.) For example, in *ANV Enterprises*, GAO denied a protest alleging that the PWS was ambiguous and thus unreasonably risky for potential contractors. “Contracting” issues are those related to other traditional (i.e. non-A-76) procurement issues, most often involving the technical and price/cost analysis of private sector offerors, or the contractor source selection decision. For example, in *Consolidated Engineering Services*, GAO sustained a protest where the procuring agency failed to properly follow its evaluation scheme in determining the protestor unacceptable in past performance. In *Gemini*, GAO denied the protest, finding that the procuring agency had the right to evaluate staffing proposals against an undisclosed staffing estimate.

The fifth issue category, “Legal/GAO Procedural”, covers issues related to such legal process matters as timeliness of protest, GAO’s legal jurisdiction to hear a particular protest or issue, etc. For example, in *OMNI*, GAO dismissed a protest against the private sector selection decision, requiring that the protestor first attend the procuring agency’s post-award debriefing before electing to file any protest.

Many of the GAO cases involve multiple issues. Thus, there are more issues (82) than protests (46). It is noted that GAO often rules on an issue-by-issue basis. Therefore, in a single protest decision, the Government can win on certain issues and lose on other issues. Of course, a Government loss on any single issue within a protest results in an overall GAO decision in favor of the protestor (i.e. a Government protest loss.) [Ref. 46]

The GAO case issue data is arrayed below, showing the total number of issues contested in the protest issue categories, the number of issues won by the Government, the number of issues lost by the Government, and the resulting Government win rates.

1. A-76 Process Issues

43 Total	25 Wins	18 Losses	58% Govt. win rate
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2. A-76 Process – Balancing Issues

10 Total 2 Wins 8 Losses 20% Govt. win rate

3. PWS Issues

3 Total 3 Wins 0 Losses 100% Govt. win rate

4. Contracting Issues

18 Total 13 Wins 5 Losses 72% Govt. win rate

5. Legal/GAO Procedural Issues

8 Total 8 Wins 0 Losses 100% Govt. win rate

6. All Protest Issues – Cumulative Totals

82 Total 51 Wins 31 Losses 62% Govt. win rate

Table 3-1 - “Identification of Wins and Losses by GAO Case” shows a breakdown of issues, wins, and losses, for each of the 46 A-76 GAO protests discussed in this thesis.

Appendix A contains a brief synopsis of each GAO bid protest analyzed by the researcher. This appendix provides a short description of the issue/s contained in each protest, identifies the applicable issue categories, and provides GAO’s rulings on each issue and on each bid protest.

E. CHAPTER SUMMARY

This chapter provided an overview of the data presentation, including an explanation of the parameters used to present the GAO bid protest case data. It also

covered an explanation of the use of the Government win rate, and the criteria used by the researcher to define a Government protest win or loss. This chapter further categorized the protest issues into five discrete categories. The researcher presented the GAO protest case data, issue data, and Government win rates for each category.

The next chapter will analyze the data presented herein.

Table 3-1 – Identification Of Wins and Losses by GAO Case

CASE	A-76 Process	A-76 Balancing	PWS	Contracting	Legal/ Procedural	Total Issues*
Aberdeen	L	L		L		3L
AHNTECH				W		W
AFGE					W	W
ANV			W			W
BAE	L	2L				3L
BMAR	W			L		W/L
COBRO	L	L				2L
Consolidated				L		L
Crown/Health	2W					2W
Crown/Supp.					W	W
Day-Zimm.	W		W			2W
Del-Jen	3L					3L
DON (Navy)	L					L
DYNCORP	L	L				2L
FPI					W	W
Gemini				W		W
E.L. Hamm				W		W
Imaging Sys.	W/L					W/L
IME	2W	W				3W
IT (2001)	L					L
IT (2002)				W		W
IT Facility	3W			2W		5W
J&E Assoc.				W		W
Johnson(2/01)				L		L
Johnson(11/01)	2W					2W
Jones-Hill('00)		L				L
Jones-Hill('01)	2L	L				3L
Lackland(7/01)	L					L
Lackland(12/01)	W			W		2W
LBM			W			W
Madison	W					W
Morrison-Knu.	L					L
N&N Travel	W			L		W/L
NVT Tech.	3W					3W
OMNI					W	W
Pacific Support	2W					2W
PharmChem				W	3W	4W
Rice (2000)		L				L
Rice (2002)				W		W
RTS Travel	W					W
Shaw				W		W
Sodexho	W/L	W				2W/L
S-W Anesthesia				W	W	2W
Symvionics	2W					2W
TDF Corp.	W			W		2W
Trajen	3L					3L
TOTALS	25W/18L	2W/8L	3W	13W/5L	8W	51W/31L

(*Any one loss (“L”) results in an overall loss/decision against the Government.)

IV. DATA ANALYSIS

A. OVERVIEW

This chapter will provide an analysis of the data that was presented in Chapter III. The researcher will first analyze the General Accounting Office (GAO) bid protest case data (i.e. that data arrayed on an overall case-by-case basis.) The researcher will then analyze the issue data within each of the five issue categories (i.e. that data arrayed using the topical issue categories previously identified.) Within each issue category, common themes, trends, and problems will be identified as applicable.

B. ANALYSIS OF GAO CASE DATA

1. All GAO A-76 Decisions

The thesis identifies a total of 46 A-76 bid protests (or cases) decided by GAO during the period 5 February 1996 to 23 December 2002. There were 27 wins and 19 losses, resulting in a Government win rate of 59 percent:

46 Total	27 Wins	19 Losses	59% Govt. win rate
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(The reader is reminded that the terms “Government win rate”, “win rate”, “Government win”, or “win” are defined to mean that the *Government procuring agency successfully won or defended the protest*. These terms do NOT refer to which entity won the A-76 cost comparison, Government or contractor.)

During the last several years, the overall Government win rate at GAO for all bid protest actions was approximately 80 percent. [Ref. 72] The government loses a significantly higher percentage of A-76 bid protests (41%) compared to its loss rate on all protests overall (20%.)

The GAO case data is further examined below, to determine what effect (if any) the various case parameters have on the outcome of the protest actions.

2. By Study Type

The total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates are shown below.

41 Full study	24 Wins	17 Losses	59% Govt. win rate
2 Non A-76 RFPs*	1 Win	1 Loss	50% Govt. win rate
1 Direct conversion	1 Win	0 Losses	100% Govt. win rate
2 Task Orders**	1 Win	1 Loss	50% Govt. win rate

(*Request For Proposal/**Order under existing contract)

A full study is the formal A-76 process described in Chapter II, Section B. The RFPs and task orders were non-A-76 procurements challenged as violations of A-76 policies. A direct conversion is essentially a normal (non-A-76) acquisition of services, conducted after an initial market survey results in the determination that performance by contract would be more economical than performance by in-house employees. This technique is generally limited to A-76 studies involving ten or fewer civilian employees. [Ref. 64]

The 59 percent Government win rate for full studies exactly mirrors the Government win rate for all the A-76 cases examined in this thesis. There are an insufficient number of cases in the other three study type categories to derive statistically significant win rates.

The study type thus has no observable effect on the Government win rate at GAO.

3. By Protest Type

The total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates are shown below.

37 Award protest*	21 Wins	16 Losses	57% Govt. win rate
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3. By Protest Type (con't.)

9 Pre-award protest** 6 Wins 3 Losses 67% Govt. win rate

(*Protest against source selection or cost comparison decision)

(**Protest against solicitation terms and conditions, or other prior to selection/decision)

The 57 percent Government win rate for award protests closely approximates the Government win rate for all the A-76 cases examined in this thesis (59%.)

Within the subset of pre-award protests, the Government has a better win rate (67%) compared to the win rate for A-76 protests overall (59%.) In order to determine the cause of this relative success, an examination of the issues contested in the pre-award subset is useful. The Pre-award protests generally involve challenges to the Government's specifications, clauses, provisions, or source selection methodology (filed before the deadline for bids or proposals), or else they involve challenges after submission of offers but prior to source selection, most often objections to the protestor's exclusion from the competitive range. [Ref. 72]

GAO has consistently held that the Government has broad authority and discretion to determine its own requirements, also known as the government's "minimum needs." GAO will not normally question the procuring agency's judgment in this regard, as long as the agency acts reasonably. For example, in *LBM*, GAO found that the procuring agency acted reasonably in requiring that private sector offerors be certified to ISO 9000 quality standards prior to the commencement of contract services. In *ANV Enterprises*, GAO denied a protest alleging that the performance work statement (PWS) was ambiguous and risky due to lack of detail. GAO stated that the procuring agency disclosed all reasonably available information in its solicitation. The Government normally is successful in winning these protests against solicitation terms and conditions.

The other types of pre-award protests generally involve challenges after submission of offers but prior to source selection, most often objections to the protestor's exclusion from the competitive range. Results in these protests are mixed. For example, in *AHNTECH*, GAO denied a protest that the protestor was improperly excluded from the

competition's competitive range due to insufficient staffing. GAO found that the procuring agency had the right to evaluate staffing against an undisclosed staffing estimate. However, in *N&N Travel & Tours*, GAO sustained the protestor's contention that it was improperly barred from competing, due to procuring agency's issuance of a task order for the required services.

Another way to examine the higher Government win rate in the protest type category is by use of the five protest issue categories identified in Chapter III. The two issue categories unique to A-76 acquisitions, "A-76 Process Issues" and A-76 Process – Balancing Issues", have relatively low Government win rates (58 percent and 20 percent respectively.) The remaining three issue categories, those not directly related to A-76 acquisitions, "PWS Issues", "Contracting Issues", and "Legal/GAO Procedural Issues", have relatively high Government win rates (100 percent, 72 percent, and 100 percent respectively.)

The researcher examined the issues contained within the award and pre-award subsets of the protest type category. In the award protest subset, 69 percent of the issues contested (48 out of 70 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. By contrast, in the pre-award protest subset, only 42 percent of the issues contested (five out of 12 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. Thus, the relatively high Government win rate under pre-award A-76 protests is due in part to the lower incidence of A-76 protest issues (i.e. those issues that the Government more often loses.)

In summary, the 57 percent Government win rate for award protests closely approximates the Government win rate for all the A-76 cases examined in this thesis (59%.) Conversely, for pre-award protests, the Government has a better win rate (67%) compared to the win rate for A-76 protests overall (59%.) This higher win rate for pre-award protests is attributable to a lower incidence of problematic A-76 issues, and a higher incidence of easily defended challenges to the Government's determination of its minimum needs.

4. By Private Sector Source Selection Strategy

The total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates are

shown below. (Chapter III contains a detailed explanation of the various private sector source selection strategies utilized in A-76 acquisitions.)

30 Trade-Off	16 Wins	14 Losses	53% Govt. win rate
10 LPTA	8 Wins	2 Losses	80% Govt. win rate
4 IFB	2 Wins	2 Losses	50% Govt. win rate
2 Sole Source*	1 Win	1 Loss	50% Govt. win rate

(*One task order/one single source procurement under small disadvantaged business program)

There are an insufficient number of cases in the Invitation For Bid (IFB) and sole source subsets to derive statistically significant Government win rates.

The 53 percent Government win rate for trade-off source selection reasonably approximates the Government win rate for all the A-76 cases examined in this thesis (59%.)

The 80 percent Government win rate for low priced technically acceptable (LPTA) source selection is significantly higher than the Government win rate for all the A-76 cases examined in this thesis (59%), and significantly higher than the Government win rate for trade-off source selection (53%.) The reasons for the high LPTA win rate are observable from an examination of the protest issues contested in each source selection strategy subset. The Government's lowest win rate by issue category occurs under A-76 Process – Balancing Issues (20%.) These are the most difficult protest issues for the Government to win under A-76 acquisitions. The potential for technical balancing generally occurs only under negotiated trade-off A-76 source selections. Trade-off acquisition weights technical and price proposals, and encourages enhancements in performance and performance quality. The presence or possible presence of technical enhancements in the private sector challenger's proposal creates the need to examine the level of performance and performance quality in the Government MP, and possibly balance the MP against the contractor's proposal. Conversely, LPTA procurements have

little potential for balancing, given that private sector selection is made on the basis of low price. In fact, all of the A-76 Process – Balancing Issues examined in this thesis occurred under trade-off source selection strategies. Thus, the high LPTA Government win rate is driven in part by the absence of the most difficult protest issues (i.e. A-76 Process – Balancing.)

The researcher additionally examined the two unique A-76 protest issue categories (“A-76 Process Issues” and A-76 Process – Balancing Issues”) as a percentage of all protest issues contested in the LPTA and trade-off source selection categories. As stated above, the Government win rates under these two A-76 issue categories are much lower than the win rates in the three other non-A-76 issue categories. In the trade-off subset, 65 percent of the issues contested (35 out of 54 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. By contrast, in the LPTA subset, only 59 percent of the issues contested (ten out of 17 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. Thus, the relatively high Government win rate under LPTA A-76 protests is due in part to the lower incidence of A-76 protest issues (i.e. those issues that the Government more often loses.)

In summary, the 53 percent Government win rate for trade-off source selection reasonably approximates the Government win rate for all the A-76 cases examined in this thesis (59%.) Conversely, for LPTA source selection, the Government has a better win rate (80%) compared to the win rate for A-76 protests overall (59%.) This higher win rate for LPTA source selection protests is attributable to a lower incidence of problematic A-76 issues, and particularly due to the absence of any A-76 Process – Balancing Issues.

5. By Procuring Agency/Agency Under Study

The total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates are shown below.

13 USAF	6 Wins	7 Losses	46% Govt. win rate
17 Navy	10 Wins	7 Losses	59% Govt. win rate
12 Army	8 Wins	4 Losses	67% Govt. win rate

5. By Procuring Agency/Agency Under Study (con't.)

1 DLA*	1 Win	0 Losses	100% Govt. win rate
1 DCA**	1 Win	0 Losses	100% Govt. win rate
1 IHS ***	1 Win	0 Losses	100% Govt. win rate
1 DoD****	0 Wins	1 Loss	0% Govt. win rate

(*Defense Logistics Agency/**Defense Commissary Agency/**Indian Health Service/****DoD Pentagon Heating and Refrigeration Plant)

There are an insufficient number of cases in the DLA, DCA, IHS, and DoD subsets to derive statistically significant Government win rates.

The 59 percent Government win rate for protests against Navy A-76 procurements exactly mirrors the Government win rate for all the A-76 cases examined in this thesis (59%.) The 46% Government win rate for protests against USAF A-76 procurements is significantly lower than the Government win rate for all the A-76 cases examined (59%.) The 67% Government win rate for protests against Army A-76 procurements is significantly higher than the Government win rate for all the A-76 cases examined (59%.)

The researcher cannot ascertain significant trends from the case parameter data to explain the differing win rates among Army, Navy, and USAF A-76 bid protests. Each procuring agency has defended a variety of A-76 protests, consisting of a variety of study types, private sector source selection strategies, and protest types during the period examined. Instead, the explanation for the varying win rates may be found in the protest issues contested within the cases.

The researcher has again examined the two unique A-76 protest issue categories (“A-76 Process Issues” and A-76 Process – Balancing Issues”) as a percentage of all protest issues contested in the Army, Navy, and USAF A-76 bid protest categories. As stated above, the Government win rates under these two A-76 issue categories are much lower than the win rates in the three other non-A-76 issue categories. In the Army subset, only 29 percent of the issues contested (eight out of 28 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. In the Navy subset, 71 percent of the issues

contested (20 out of 28 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. In the USAF subset, 58 percent of the issues contested (19 out of 33 issues) are either A-76 Process Issues or A-76 Process – Balancing Issues. The relatively high Government win rate under Army A-76 protests is thus due in part to the lower incidence of A-76 protest issues (i.e. those issues that the Government more often loses.) However, the percentage of A-76 Process Issues and A-76 Process – Balancing Issues in the USAF cases does not explain why the USAF Government win rate (46%) is lower than the overall Government win rate for all the cases examined in this thesis (59%), and lower than the Navy’s win rate (59%.)

In summary, the 59 percent Government win rate for protests against Navy A-76 procurements exactly mirrors the Government win rate for all the A-76 cases examined in this thesis (59%.) Conversely, in the Army procurements, the Government has a better win rate (67%) compared to the win rate for A-76 protests overall (59%.) This higher win rate for Army protests is attributable to a much lower incidence of problematic A-76 issues. The reasons for the relatively low USAF win rate are not apparent from an examination of the issue categories.

6. By Year of Protest Action

The total number of protests, the number of protests won by the Government, the number of protests lost by the Government, and the resulting Government win rates are shown below.

2 CY* 1996	2 Wins	0 Losses	100% Govt. win rate
1 CY 1997	1 Win	0 Losses	100% Govt. win rate
4 CY 1998	4 Wins	0 Losses	100% Govt. win rate
5 CY 1999	3 Wins	2 Losses	60% Govt. win rate
9 CY 2000	3 Wins	6 Losses	33% Govt. win rate
11 CY 2001	5 Wins	6 Losses	45% Govt. win rate
14 CY 2002	9 Wins	5 Losses	64% Govt. win rate

(*calendar year)

The researcher has examined the two unique A-76 protest issue categories (“A-76 Process Issues” and A-76 Process – Balancing Issues”) as a percentage of all protest issues contested in the bid protests in each year. As stated above, the Government win rates under these two A-76 issue categories are much lower than the win rates in the three other non-A-76 issue categories. The Government protest win rates by year of protest are shown below, along with the corresponding percentages of A-76 protest issues as a portion of all protest issues.

2 CY 1996	100% win rate	67% (2 A-76 issues/ 3 total issues)
1 CY 1997	100% win rate	100% (1 A-76 issue/ 1 total issue)
4 CY 1998	100% win rate	0 % (0 A-76 issues/ 8 total issues)
5 CY 1999	60% win rate	71% (5 A-76 issues/ 7 total issues)
9 CY 2000	33% win rate	68% (13 A-76 issues/ 19 total issues)
11 CY 2001	45% win rate	74% (14 A-76 issues/ 19 total issues)
14 CY 2002	64% Govt. win rate	72% (18 A-76 issues/ 25 total issues)

Calendar years 1996 and 1997 can be eliminated from statistical consideration due to the low number of cases and low number of issues in those years. In 1998, the Government won all of the A-76 protests; this may be attributed to the absence of any of the problematic A-76 protest issues in those GAO cases. In the cases from 1999 through 2002, A-76 protest issues were contested. The lower Government win rates in these years can be attributed to the presence of these more difficult (for the Government) A-76 protest issues. However, there is not an exact correlation between the percentage of A-76 issues and the Government protest win rates during the four-year period. Further insight may be gained from an examination of the A-76 Process – Balancing Issues present in each year’s cases.

A-76 Process – Balancing Issues are the most difficult issues for the Government to win (20% Government win rate.) There were no A-76 Process – Balancing Issues contested in 1999. In 2000 there were three A-76 Process – Balancing Issues contested, and four contested in 2001 (all seven of these issues were lost by the Government.) The win rates in these years were lower than in 1999. Although 2002 also saw three A-76 Process – Balancing Issues contested, two of the three issues were won by the Government. Thus, there is some correlation between the presence of A-76 Process – Balancing Issues (and the procuring agency’s success in defending protests on these issues) and the varying Government win rates over time.

In summary, while no definitive results are apparent, the data suggest that the variations in the Government win rate over time is driven in large part by the percentage of the more difficult A-76 protest issues contested in each year.

7. Summary of Analysis of GAO Case Data

The GAO case data were examined to determine what effect (if any) the various case parameters had on the outcome of the protest actions.

The study type (full study, direct conversion, etc.) has no observable effect on the Government win rate at GAO.

Under protest type (award or pre-award protest), the Government has a better win rate (67%) on pre-award protests compared to the win rate for A-76 protests overall (59%.) This higher win rate for pre-award protests is attributable to a lower incidence of problematic A-76 issues, and a higher incidence of easily defended challenges to the Government’s determination of its minimum needs.

Under the various private sector source selection strategies, the Government has a better win rate (80%) on LPTA source selection protests compared to the win rate for A-76 protests overall (59%.) This higher win rate for LPTA source selection protests is attributable to a lower incidence of problematic A-76 issues, and particularly due to the absence of any A-76 Process – Balancing Issues.

Within the case data categories of protests by procuring agency and protests by year, the data suggest that the Government win rates are driven by the varying percentages of the more problematic A-76 protest issues, and not by the identity of the procuring agency that conducted the acquisition nor by the year of the protest.

Overall, the types of issues within the cases, and the difficulty in defending those various issues, drive the Government's A-76 bid protest win rate.

The next section in this chapter will analyze the specific issue data within each of the five issue categories (i.e. that data arrayed using the topical issue categories previously identified.) Within each issue category, common themes, trends, and problems will be identified as applicable.

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C. ANALYSIS OF GAO ISSUE DATA

1. All GAO Issues

The GAO issue data is arrayed below, showing the total number of issues contested in the protest issue categories, the number of issues won by the Government, the number of issues lost by the Government, and the resulting Government win rates.

A-76 Process Issues

43 Total	25 Wins	18 Losses	58% Govt. win rate
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A-76 Process – Balancing Issues

10 Total	2 Wins	8 Losses	20% Govt. win rate
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PWS Issues

3 Total	3 Wins	0 Losses	100% Govt. win rate
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Contracting Issues

18 Total	13 Wins	5 Losses	72% Govt. win rate
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Legal/GAO Procedural Issues

8 Total	8 Wins	0 Losses	100% Govt. win rate
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All Protest Issues – Cumulative Totals

82 Total	51 Wins	31 Losses	62% Govt. win rate
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The 62 percent cumulative Government win rate for all issue categories closely approximates the Government win rate for all the A-76 bid protest cases examined in this thesis (59%). Both of these A-76 Government win rates are significantly lower than the overall Government win rate at GAO for all bid protest actions (approximately 80 percent.)

The two issue categories unique to A-76 acquisitions, “A-76 Process Issues” and “A-76 Process – Balancing Issues”, have relatively low Government win rates (58 percent and 20 percent respectively.) The remaining three issue categories, those not directly related to A-76 acquisitions, “PWS Issues”, “Contracting Issues”, and “Legal/GAO Procedural Issues”, have relatively high Government win rates (100 percent, 72 percent, and 100 percent respectively.) Procuring agencies have had difficulty defending their actions in issues unique to A-76 procurements. These two A-76 protest issue categories will be analyzed below. The three non-A-76 protest issue categories will also be analyzed, to present a complete picture of all the issues contested at GAO under A-76 acquisitions. The categories will be analyzed via an examination of representative protests in each category. The GAO cases applicable to each category (or in each topical grouping within a category where applicable) will generally be discussed in chronological order, as GAO often builds on its earlier decisions in deciding bid protests. Within each issue category or topical grouping, common themes, trends, and problems will be identified as applicable.

2. Analysis of A-76 Process Issues

The researcher has defined A-76 Process Issues as those protest matters concerning the policies and procedures unique to A-76 acquisitions. (The only exceptions are A-76 Process – Balancing issues, which are separately covered in Section C.3 below.) A review of the A-76 Process Issues reveals that these issues can best be examined in four topical groupings: issues related to Government Management (MP) compliance with the performance work statement (PWS) and proper costing of the MP; application of A-76 Revised Supplemental Handbook (RSH) cost adjustment factors; applicability of A-76 rules, procedures and processes; and, ethics/conflict of interest considerations. Each grouping is discussed below.

a. Government Management Plan (MP) – Compliance with PWS and Proper Costing

In *Aberdeen*, GAO first examined matters involving the Government Management Plan's compliance with the PWS and proper costing of the Management Plan (MP.) [Ref. 5] The protestor alleged that the MP did not include the full costs of a program manager and other key personnel. The procuring agency argued that the PWS required on-site key personnel, but not necessarily full-time personnel. However, GAO noted that the PWS required key personnel to be on-site during normal operating hours, and interpreted that statement to mean full-time. GAO ruled in favor of the protestor on this issue, finding that the MP did not include required staffing and the cost associated with that staffing. In *Trajen*, the case turned on a debate over whether the Government MP failed to include two-thirds of one full-time equivalent (FTE) position to perform spot painting duties under an operation and maintenance requirement. [Ref. 50] GAO held that notwithstanding the procuring agency's arguments to the contrary, there was no evidence in the MP that other proposed FTE were designated to perform spot painting, and found in favor of the protestor on this issue.

In *Crown Healthcare Laundry*, GAO examined the procuring agency's evaluation of an offer from another Government agency, the Department of Veterans Affairs (VA.) [Ref. 13] The VA submitted an offer to perform work for the USAF under an interagency sharing agreement (similar to an inter-service support agreement (ISSA) within DoD), as permitted by the A-76 RSH. Crown had been the incumbent contractor performing the services. The procuring agency decided to allow the VA to perform the work based on the results of the A-76 cost comparison, which indicated that the VA would be lower cost. Crown protested, alleging that the VA underestimated the effort (and thus the cost) to do the work. The protestor specifically alleged that the VA understaffed the project, and also proposed fewer trucks than required by the PWS. GAO stated that the PWS was performance based, such that each offeror could decide how to staff the work and how many laundry trucks it would use. Thus, GAO found that the procuring agency reasonably accepted the VA estimates, and found in favor of the procuring agency on this issue.

In *Imaging Systems*, the protestor alleged that the Government MP did not consider all costs of Government in-house staffing in calculating the In-House Cost Estimate (IHCE.) [Ref. 22] GAO found in favor of the protestor on this issue, ruling that the MP intended to use in-house labor from remote locations (locations physically separate from the primary location of services), but failed to include the costs of that support. GAO disagreed with the procuring agency's contention that this existing supporting workforce could absorb the additional work without an increase in staffing, and that this effort therefore represented a sunk cost that did not have to be included in the IHCE. In *BAE*, GAO stated that the Government MP did not meet PWS requirements regarding key personnel. [Ref. 9] Unlike *Aberdeen*, the key personnel issue in *BAE* was not the amount of staffing hours proposed, but rather whether the individuals proposed in the MP met the PWS requirements for education and experience. The procuring agency argued that federal personnel and A-76 rules prohibited the MP from designating specific individuals. GAO stated that these constraints did not alter the requirement for the MP to indicate compliance in all respects with the PWS, and sustained the protest on this issue.

In *Cobro*, the protestor argued that private sector offerors and the Government MP were treated differently with respect to government-furnished facilities. [Ref. 11] The solicitation failed to identify the government-furnished facilities that the activity intended to make available to the A-76 service provider, whether Government MP or private sector contractor. The Government MP nevertheless assumed that it would have free use of the facilities, and accordingly did not include associated costs. The protestor and other offerors were forced to include all facilities' costs in their proposals. GAO ruled in favor of the protestor on this issue, stating that the procuring agency allowed the MP to compete on an unequal footing with private sector firms.

In *Johnson Controls* [Nov. 23, 2001], one of the protestor's major arguments was that the Government MP was deficient, in that the Government MP did not include sufficient staffing (and the associated costs) necessary to perform a number of PWS requirements. [Ref. 29] GAO stated, "It is not our Office's role to determine the appropriate staffing level of either the in-house team or the private sector offeror. Instead, our role is to determine whether there was a reasonable basis for the agency's determinations in this regard." [Ref. 29 p. 10] Accordingly, GAO carefully reviewed the

procuring agency record regarding the MP's logic in staffing and costing the requirement, including the review documentation of the Government administrative appeal authority. GAO denied the protest, stating that the procuring agency properly concluded that the MP had identified and cost all necessary Most Efficient Organization (MEO) positions.

In *Jones/Hill Joint Venture [Dec. 5, 2001]*, the protestor alleged that the Government MP did not fully include all costs necessary to perform the PWS. [Ref. 31] Similar to *Imaging Systems*, the MP intended to use supporting labor from personnel not included in the Government MEO. In one case, the procuring agency argued that the non-MEO level of support was of nominal cost; GAO stated that the MP's failure to include all costs caused an unfair cost comparison. In other instances of non-MEO support, the procuring agency stated that the Government IHCE did in fact include the appropriate costs; however, GAO found no documentation in the procurement record that supported the agency's assertion. Accordingly, GAO sustained the protest.

In *NVT*, the protestor objected that the Government MP did not utilize standard material "plug-in costs" (i.e. estimated costs stated in the solicitation that all private sector offerors were required to utilize.) [Ref. 38] GAO stated that the Government MP did include material costs, calculated based on the solicitation's historical workload, that were in fact higher than the material plug-in amounts. The protestor also argued that the Government MP did not cost out all safety, quality, and repair PWS requirements. GAO found that the protestor merely disagreed with the MEO staffing quantities and resulting IHCE costs calculated in the Government MP, and that the record supported that the MP did consider all PWS functions. GAO denied the protest on these issues.

In *Integrity Management*, the protestor argued that the Government MP was not capable of performing the PWS and did not cover all necessary costs of performance. [Ref. 23] GAO found that the procuring agency's source selection authority (SSA) sought the assistance of the technical evaluation board to insure that the Government MP was capable of performing. The procurement file provided detailed documentation showing that the SSA carefully reviewed the MP to insure that the Government was fully capable of performing the PWS. GAO denied the protest on this issue. In *Sodexo*, in response to a protest alleging that the Government MP failed to

meet numerous PWS requirements, GAO found that the procuring agency properly evaluated the MP, that there was no basis to conclude that the MP failed to meet the PWS, and denied the protest on this issue. [Ref. 46]

There are several themes common to a number of these protest issues related to the Government MP. Most of the instances of alleged or actual MP non-compliance revolve around sufficiency of staffing, not surprising for service efforts. However, within the staffing matters protested, problems with both key personnel requirements and with non-MEO support appear in several instances. Key personnel requirements created problems with MP compliance regarding the number of hours proposed, and also created problems regarding the ability of proposed MP key personnel to meet PWS minimum standards for education and experience. In several cases, the Government MP failed to account for supporting in-house staff within the MEO, or failed to include the costs of that non-MEO support in the Government IHCE.

Another theme that emerges is GAO's focus on consistent treatment of the Government MP and the private sector challenger. Both the Government MP and the private sector challenger must be held to the same PWS standards. Regardless of whether the issue is related to staffing, government-furnished facilities, or other technical and cost issues, GAO requires that both parties in the A-76 competition be treated consistently to insure a fair Government versus contractor cost comparison. This emphasis on fairness in the cost comparison phase (Government versus contractor) echoes GAO's historical approach when evaluating competing private offers under non-A-76 procurements.

GAO also makes clear that under a performance based PWS, the Government MP may be acceptable, even if it provides a very different staffing and technical approach from that of the private sector challenger. This is consistent with GAO's position that acceptable staffing levels and technical approaches may vary among private sector offerors as well.

Similar to traditional non-A-76 procurement, GAO's decisions emphasize the need for the procuring agency to follow the evaluation scheme set forth in the solicitation, and to appropriately and thoroughly document its actions in the contract file. As part of that documentation, the GAO decisions clearly indicate that the procuring

agency's SSA is fully responsible for insuring that the Government MP can meet PWS requirements, even though the A-76 RSH charges the requiring activity's "Independent Review Officer (IRO)" with performing this function.

***b. Application of A-76 Revised Supplemental Handbook (RSH)
Cost Adjustment Factors***

In *Crown Healthcare Laundry*, GAO addressed an allegation regarding the procuring agency's application of a cost factor to the protestor's proposal, representing the additional cost to the Government for contract administration should the contractor win the A-76 cost comparison. [Ref. 13] The A-76 RSH provides for the addition of this cost as an upward adjustment to the price/cost of the private sector challenger's price. [Ref. 64] The protestor alleged that the procuring agency should have also added the Government's cost of contract administration to the cost of the successful offer from the Department of Veteran's Affairs (VA.) The VA had submitted an offer to perform the services under an interagency sharing agreement (similar to an inter-service support agreement (ISSA) within DoD.) The RSH states that when comparing ISSAs to other offers, costs such as contract administration must be taken into account to insure a fair comparison. The procuring agency contended that the VA would do its own quality assurance, and that the cost of that administration was included within the VA's price. GAO denied the protest, stating that the agency was proper in not adding the contract administration cost factor to the ISSA under these circumstances.

In *Trajen*, the protestor contended that the procuring agency made errors in the application and calculation of two A-76 RSH cost adjustment factors, the tax adjustment factor and one-time conversion costs. [Ref. 50] For tax adjustment, the RSH provides for a decrease to the private sector challenger's evaluated price; the decrease amount represents the additional corporate income taxes that would accrue to the Government if a contract were awarded to the private sector firm. [Ref. 64 p. 27] Appendix 4 of the RSH lists the tax rate factors by industry; the tax rate factor is multiplied by the proposed contract price to calculate the amount of downward adjustment. The procuring agency utilized a 0.3% tax rate for petroleum products, whereas the protestor contended that a higher 0.5% tax rate for miscellaneous services was more appropriate, and would have resulted in a larger decrease to the protestor's

price. (The PWS covered operation and maintenance of the Defense Fuel Support Point Pearl Harbor.) GAO found in favor of the protestor, because the lower tax rate was selected from a wholesale trade (product) classification, rather than from a services classification. Regarding one-time conversion costs, the RSH provides for these costs to be added as an upward adjustment to the private sector challenger's price; one-time conversion costs typically include such expenses as transfer of government-furnished material and severance pay for displaced Government employees. GAO also ruled in favor of the protestor on this issue, stating that the Government administrative appeal authority improperly overstated the one-time conversion costs by including the relocation cost of one military full-time equivalent (FTE), in addition to two civilian positions. The A-76 RSH does not permit military personnel relocation expenses to be included in one-time conversion costs.

In *Day Zimmerman*, the protestor alleged that a solicitation requirement for private offerors to include insurance costs was unfair, given that the Government MP did not have to include such costs. [Ref. 15] GAO stated that the Government is self-insured (and thus incurs no premium costs), and that the A-76 RSH takes this into account by requiring that the MP include a cost addition factor to account for this discrepancy. The MP did include the cost addition factor for insurance. Accordingly, GAO denied the protest. In *DynCorp*, the protestor alleged that the agency improperly evaluated the cost of government furnished material. [Ref. 18] GAO sustained the protest on this issue, stating that the procuring agency allowed the Government IHCE to deduct the cost value of government furnished material, without the agency making the required corresponding downward adjustment to the protestor's cost.

In *NVT Technologies*, the protestor argued that the contract administration adjustment costs added to the protestor's price were too high, due to use of an excessive employee grade structure and mix for the Government's contract administration team. [Ref. 38] The A-76 RSH provides for the addition of contract administration costs as an upward adjustment to the price/cost of the private sector challenger's price. The RSH provides a table that allocates the allowable number of contract administration personnel, based on the size (number of FTE) of the Government MEO. However, the RSH permits the requiring activity to determine the appropriate grade structure for contract

administration personnel, and does not dictate the salary portion of the equation. GAO stated that the protestor merely questioned the judgment of the procuring agency, but did not show that the agency's explanation of the grade structure utilized was unreasonable. Therefore, GAO ruled in favor of the procuring agency on this issue. In *Del-Jen*, the protestor successfully argued that the procuring agency improperly overstated the number of contract administration personnel, and thus overstated the contract administration costs that were added to the protestor's price. [Ref. 16]

In these A-76 RSH cost adjustment issues, GAO again considered whether or not the procuring agency treated the Government MP and the private sector challenger consistently and fairly. In *Day Zimmerman*, GAO found that the procuring agency assessed insurance costs for both the MP and the private sector challenger, and denied the protest. In *DynCorp*, GAO sustained the protest, finding that the procuring agency allowed only the Government MP the cost reduction benefit related to government furnished material.

The other major theme is GAO's examination of whether or not the procuring agency followed required processes in calculating and applying the various cost adjustment factors, and whether or not any required subjective judgments were reasonably based and coherently recorded in the contract file.

c. Applicability of A-76 Rules, Procedures and Processes

In *Madison*, the protestor alleged that the procuring agency violated the A-76 process by allowing the Government MP team to change its IHCE after the agency evaluated the protestor's proposal. [Ref. 35] The procuring agency first evaluated private sector proposals, held two rounds of discussions, and decided that Madison's proposal represented the best value private sector offer. After selecting Madison as the private sector challenger, the procuring agency turned to an evaluation of the Government MP. The agency's review of the Government IHCE revealed that the IHCE failed to include the costs of required material and supplies. The procuring agency requested that the Government MP team make necessary changes and add increased costs to cover the costs of material and supplies. The protestor alleged that the agency "gamed" the process by first reviewing the protestor's proposal, then adding insufficient material and supply costs to the MP, such that the MP remained the low evaluated price.

[Ref. 35 p. 3] GAO stated that the procuring agency properly allowed the correction of a simple mistake in the IHCE, and found no evidence that the agency improperly used any insights gained from its review of the protestor's proposal.

In *Symvionics*, the protestor contested two issues in this topical grouping. [Ref. 48] First, the protestor alleged that the procuring agency failed to properly seal the Government MP in accordance with guidelines in the A-76 RSH. The RSH requires that the Government MP be placed in a sealed envelope and submitted to the contracting officer prior to the deadline for receipt of offers. [Ref. 64 p. 11] The MP remains sealed until after the private sector challenger is selected. GAO found that although the MP was mishandled and not placed in a sealed envelope/container, it was otherwise properly completed, secured, and unaltered prior to the receipt and evaluation of the protestor's proposal. Therefore, the protestor was not prejudiced by the procuring agency's failure to follow the prescribed safeguarding procedure, and GAO denied the protest on this issue. In the second issue contested, the protestor stated that the Government administrative appeal authority improperly allowed the Government MEO to replace unallowable volunteer labor with proper appropriated fund personnel. In response to an earlier appeal challenge, the administrative appeal authority required the Government MP team to replace the volunteer labor with appropriated fund personnel, and include those costs in the Government IHCE. GAO stated that the procuring agency acted properly in allowing the MP correction, and appropriately calculated the amount of replacement labor necessary. Thus, GAO also denied the protest on this second issue.

In *BMAR & Associates*, the protestor contended that the Government MP failed to include a Technical Performance Plan (TPP) under a two-step sealed bid A-76 procurement. [Ref. 10] The TPP is one of four parts of the complete Government MP, which also includes the Most Efficient Organization (MEO), Transition Plan (TP), and In-House Cost Estimate (IHCE.) The TPP describes how the MEO will meet the requirements of the PWS. GAO denied the protest on this issue, finding that a TPP is only required in a negotiated A-76 acquisition, in accordance with provisions of the Revised Supplemental Handbook (RSH.) (The MP in a sealed bid procurement must include the MEO, TP, and IHCE however.) In *RTS Travel*, the protestor alleged that the agency improperly determined that in-house performance was more economical under a

direct conversion process (utilizing a market survey of existing contract prices in lieu of conducting a full A-76 cost study.) [Ref. 44] RTS essentially argued that a full A-76 cost comparison study should have been conducted, stating that no Government MP or MEO was prepared. GAO denied the protest, finding that the procuring agency followed proper procedures in conducting the A-76 direct conversion process, and that the direct conversion met the conditions for use (i.e. the A-76 study involved ten or less civilian positions.)

In *N&N Travel*, the protestor argued that issuance of a task order under a pre-existing contract violated A-76 policy, in that a competitive solicitation under A-76 procedures should have been issued. [Ref. 37] GAO denied the protest, stating that it had no basis to question the procuring agency's failure to utilize A-76 procedures, as no competitive solicitation was issued. In *Imaging Systems*, the protestor alleged that the procuring agency failed to utilize A-76 procedures, where the agency cancelled a non-A-76 solicitation after determining that in-house personnel could perform the work at less cost. [Ref. 22] GAO stated that non-use of A-76 may have violated agency policy, but given that the solicitation was not issued under A-76 procedures, there was no valid basis for this aspect of the protest. GAO therefore denied the protest, stating that the non-use of A-76 procedures was a matter of executive branch policy, rather than a matter of procurement impropriety.

In *Lackland 21st Century* [Dec. 4, 2001], the protestor contended that it was improper for the procuring agency to utilize its in-house audit staff to review the cost comparison steps and calculations (Government MP versus private sector challenger), before proceeding to a cost comparison decision. [Ref. 33] GAO found nothing improper in the agency's actions, especially considering that the acquisition had already been protested on an earlier occasion. In *Sodexho*, the protestor contended that the Government MP improperly used Government non-appropriated fund (NAFI) personnel for 80% of the MEO positions. [Ref. 46] GAO stated that because NAFI employees receive lower wages and fringe benefits than normal appropriated fund Government personnel, the procuring agency had a duty to disclose the MEO's use of NAFI employees to private sector offerors. Lack of such disclosure created an unfair competition, and GAO accordingly sustained the protest on this issue. GAO particularly

based its decision on its interpretation of the A-76 RSH regarding the type of Government employees normally utilized in the Government MEO. GAO concluded that the RSH does not preclude the use of NAFI employees. However, based on numerous RSH references to normal appropriated fund Government personnel in general schedule (GS) and wage grade (WG) categories, GAO found that industry could reasonably expect to be competing against appropriated fund employees (and their attendant costs) absent any notification to the contrary. The high percentage of lower-cost NAFI employees in the MEO, without notification to industry, prejudiced the A-76 competition.

Two types of protest issues are included in this topical grouping. The first relates to the overall applicability of the A-76 policy to specific Government acquisitions. GAO has generally allowed the executive agencies to determine applicability. In both *N&N Travel* and *Imaging Systems*, GAO did not question or overrule the agencies' decision to not use A-76 procedures.

The second set of issues relates to the proper application of various A-76 rules, practices, and policies, within acquisitions that were processed under A-76 procedures. GAO examined the cases to insure that procedures set forth in the RSH were properly followed. For example, in *RTS Travel*, GAO found that the procuring agency followed A-76 RSH guidelines in conducting a direct conversion. In *BMAR & Associates*, GAO stated that the procuring agency correctly interpreted the RSH, in not requiring a Government TPP under two-step sealed bidding. GAO also allowed the procuring agency some room for flexibility and took a common-sense approach in several cases. In *Madison*, GAO found that the agency acted properly in allowing the Government MP team to correct a mistake in the IHCE. In *Symvionics*, GAO noted that although the procuring agency failed to insure that the Government MP was properly sealed, the agency nevertheless safeguarded the information throughout the private sector evaluation process. In both *Symvionics* and *Sodexo*, GAO carefully considered whether the procuring agency's actions created an unfair competition, or caused an inconsistency in the treatment of the private sector challenger compared to the Government MP.

d. Ethics/Conflict of Interest Considerations

In *Morrison Knudsen*, GAO first reviewed a protest alleging conflict of interest within the process of conducting an A-76 acquisition. [Ref. 36] The procuring

agency's technical evaluation team, charged with evaluating private sector offers, included 14 evaluators (out of 16 total) who held positions that were under study via the same A-76 acquisition. The procuring agency argued that it took steps to mitigate the conflict, including the assignment of a procurement analyst not under study as team chief, and increased oversight by the Contracting Officer. However, the Contracting Officer admitted to GAO that he had realized the potential for conflict of interest, but that no other personnel with the required subject matter knowledge of the PWS were available. [Ref. 36 p. 3] GAO stated that the conflict was significant, and was analogous to an offeror evaluating a competitor. Because the 14 employees would lose their Government jobs in the event of a contractor A-76 victory, they had a powerful incentive to downgrade any potential private sector challenger. In fact, both of the private offerors who responded to the solicitation were determined to be technically unacceptable. GAO found an obvious conflict of interest that tainted the procuring agency's determination that all private sector offers were unacceptable, and sustained the protest on this issue.

In *IT Facility Services*, the protestor alleged conflict of interest based on several aspects of the membership of the source selection evaluation board (SSEB), charged with evaluating private sector offers. [Ref. 26] Four of the seven SSEB evaluators were employed within the functional departments of the activity undergoing A-76 study. GAO found no conflict and thus denied the protest on this issue, because the positions of the employees in question were not included in the A-76 study (although the employees were located in the functional department being studied.) These employees were not in danger of losing their jobs as a consequence of the A-76 study. The protestor also alleged conflict based on the fact that the spouse of one of the SSEB evaluators was employed in a position undergoing A-76 study. The spouse was in a position to lose his/her job. GAO stated that an appearance of conflict of interest did exist. However, SSEB evaluation worksheets showed that if that evaluator's rating were eliminated, the protestor would still have been rated technically unacceptable. GAO also stated that the procurement record contained no evidence that the evaluator in question influenced the other SSEB evaluators. Thus, the protestor was not harmed by the conflict of interest, and GAO denied the protest on this issue as well. This protestor also alleged that the procuring agency's use of the same support contractor to assist in both the preparation of

the Government's MP as well as the evaluation of private sector offers was improper. GAO found that the support contractor had implemented adequate "firewall" protection (i.e. the support contractor utilized different personnel for the two support tasks and did not allow information to pass from either group to the other.) Accordingly, GAO denied the protest on this issue.

In *TDF Corp.*, the protestor contended that a conflict of interest was created by the presence on the technical evaluation team of two Government employees from the functional area that was undergoing the A-76 study. [Ref. 49] GAO noted that the two employees' positions were designated as inherently governmental, and thus exempt from the study. Therefore these employees' jobs were not at risk. GAO found no evidence that the procuring agency's evaluation of the protestor's proposal was improper, nor did GAO find any evidence that the protestor was prejudiced by any potential conflict of interest. GAO therefore denied the protest on this issue.

In *Jones/Hill [Dec. 5, 2001]*, the protestor argued that the presence of the same Government employees and support contractor personnel on both the PWS team and the Government MP team constituted a conflict of interest. [Ref. 31] GAO sustained the protest, finding that the Government MP team had an unfair competitive advantage due to the information available to those MP team members who also participated in the PWS team. This decision created considerable controversy in the A-76 community. Previously, Government and support contractor employees routinely sat on both the PWS team and the MP team. The PWS and MP development processes were seen as synergistic. Examination of historical workload data collected during the PWS development phase might help the activity envision a more efficient approach to workload management. That efficiency could then be captured in the MP/MEO. Conversely, the MP team, while formulating the MP/MEO, might develop a new process considered so important or essential that the activity would choose to incorporate that process as a PWS requirement. GAO cited the Federal Acquisition Regulation (FAR) rules regarding conflicts of interest in determining that such conflicts were present in this case, stating that the procuring agency's actions gave the Government MP team information not available to private sector offerors. [Ref. 31 p. 6]

In *Department of the Navy – Reconsideration [Jones-Hill]*, the Navy asked GAO to reconsider its earlier determination that the presence of the same Government employees and support contractor personnel on both the PWS team and the Government MP team constituted a conflict of interest. [Ref. 17] GAO affirmed its earlier decision that a conflict of interest was present, rejecting the procuring agency’s argument that FAR procurement conflict provisions were not applicable to the Government MP, as the MP team was not a private sector offeror. However, GAO did modify its earlier decision, such that the revised conflict of interest standards would only be applied to A-76 procurements conducted after GAO’s initial conflict of interest ruling.

There are several common themes that run through the protests in this topical grouping. Both Government employees conducting A-76 studies, as well as the support contractors who assist them, are bound by FAR conflict of interest rules. GAO first looks to see if a conflict or an appearance of conflict is present. If so, GAO then goes on to consider whether or not the protestor was impacted or harmed as a result.

GAO’s decision in *Morrison Knudsen* clearly established that employees whose jobs were undergoing A-76 study could not participate in the evaluation of private sector proposals. However, in *IT Facility Services* and *TDF Corp.*, GAO found no conflict where the Government employee technical evaluators were in the department being studied, but were not in direct danger of losing their jobs. GAO also established that the same individual/s could not serve on both the PWS team and the Government MP team.

3. Analysis of A-76 Process – Balancing Issues

The researcher has defined A-76 Process – Balancing Issues as those protest matters concerning the technical leveling or balancing step in the A-76 process. Many A-76 procurements use best value trade-off techniques to select the private sector challenger, allowing the SSA to select other than the lowest-priced private firm. However, the A-76 procedures then require a low-price decision to select between the contractor and the Government proposals. [Ref. 64] Because the potential exists under best value for the contractor challenger to offer excesses or enhancements above PWS requirements (enhancements which may have increased the firm’s costs), the contractor

and Government technical proposals must be examined to insure that they offer the same levels of performance and performance quality. [Ref. 64] If the contractor has higher performance or quality, the SSA must require that the Government Management Plan (MP) increase performance to the same levels, and increase its price if necessary as well. In theory at least, this insures a fair price-only cost comparison. The actions of examining the Government and contractor technical proposals, and possible increases on the Government side, are known as “balancing” or “technical leveling.” Pertinent cases are discussed below.

In *Aberdeen*, the protestor argued that the procuring agency failed to consider potential balancing of the Government MP against the private sector challenger firm. [Ref. 5] GAO sustained the protest on this issue, finding that the procuring agency failed to consider the levels of performance and performance quality of the MP and private sector challenger firm. The procuring agency admitted that it failed to perform this step. In *Rice Services [June 29, 2000]*, the protestor alleged that the procuring agency failed to properly conduct technical balancing of the Government MP against the protestor’s technical proposal. [Ref. 42] GAO stated that the procuring agency noted many technical enhancements during its evaluation of the protestor’s proposal. However, when requested by the contracting officer to compare the levels of performance quality, the technical evaluation team stated that it found no differences between the Government MP and the protestor’s proposal. GAO found that the procuring agency’s generic explanation in this regard was insufficient, given that the procurement record had documented many specific excesses in the protestor’s offer. Thus, GAO sustained the protest on this issue.

In *BAE Systems*, the protestor contended that the procuring agency failed to consider the protestor’s increases to the performance standards of the PWS. [Ref. 9] GAO stated that the procuring agency failed to consider whether the protestor’s offer to improve the timeliness of service to walk-in customers (within 15 minutes, vice the 30 minute PWS requirement) was an improvement to performance. The procuring agency therefore failed to determine whether or not balancing was required in this instance. GAO accordingly sustained the protest on this issue. The protestor also alleged that the Government administrative appeal authority’s later upward adjustments to the MEO staffing were improper. GAO found that although the administrative appeal authority (in

reviewing the procuring agency's actions) did conduct technical balancing, it did not document the basis for the *amount* of staffing that was added. Thus GAO sustained the protest on this issue as well.

In *DynCorp*, the protestor contended that the procuring agency did not properly consider the protestor's accelerated performance schedule. [Ref. 18] GAO sustained the protest on this issue, finding that the procuring agency did not properly consider the impact of the acceleration as a possible increase in performance that might necessitate technical balancing. GAO stated that the agency's generic statement regarding balancing was insufficient file documentation. In *Jones/Hill [Dec. 5, 2001]*, the protestor alleged that the Government MP did not offer the same level of performance and performance quality as the protestor's proposal. [Ref. 31] GAO found that several enhancements identified in the evaluation of the protestor's technical proposal were not considered during the balancing phase of the cost comparison, and thus sustained the protest on this issue.

The final two A-76 Process – Balancing protests are the only cases in which the procuring agency (the Navy in both procurements) successfully defended against protests related to technical balancing. In *Integrity Management*, the protestor argued that its proposal provided a higher level of performance than the Government MP. [Ref. 23] GAO denied the protest on this issue, stating that the procuring agency thoroughly reviewed both the Government MP and the private sector challenger technical submissions, and properly concluded that no technical balancing was required. In *Sodexo*, the protestor contended that the procuring agency did not properly adjust the Government MP during the technical balancing phase. [Ref. 46] GAO found that the procuring agency appropriately documented the differences between the MP and the protestor's proposal, and reasonably concluded that the differences did not constitute protestor improvements to performance or performance quality. GAO therefore denied the protest on this issue.

Several common themes can be seen in these protests. In a number of cases, the procuring agency failed to follow the required A-76 RSH balancing process, either completely failing to consider the need for balancing, or failing to consider the potential

impact of private sector challenger enhancements in performing the balancing step. In some cases, the agency did not properly document and support the analysis and rationale utilized in the balancing phase.

The *Integrity Management* and *Sodexo* protests provide a sharp counterpoint. In each of these acquisitions, the procuring agency fully considered the need for technical balancing. The agency's written analysis thoroughly documented its leveling review and the rationale for the conclusions reached. In *Integrity Management*, the SSA specifically advised the (eventual) protestor during discussions that he found no evidence of increases in performance or performance quality beyond that required by the PWS, giving the firm the opportunity to rebut the SSA's position, and/or improve the firm's technical proposal. [Ref. 23 p. 5]

4. Analysis of PWS Issues

The researcher has defined PWS Issues as those traditional (i.e. non-A-76) protest matters related to the performance work statement (PWS), sometimes referred to as the statement of work (SOW.) Pertinent cases are discussed below.

In *ANV Enterprises*, the protestor alleged that the PWS was ambiguous due to lack of detail, and risky due to the failure of the solicitation to offer equipment as Government-furnished. [Ref. 8] GAO denied the protest on this issue, finding that the procuring agency disclosed all available information, and was not required to offer Government-furnished equipment merely to reduce potential contractor risk. In *LBM*, the protestor objected to the solicitation requirement that private offerors must be certified to ISO-9000 quality standards not later than the start date of contract services. [Ref. 34] GAO denied the protest on this issue, finding that the procuring agency acted reasonably in imposing the quality requirement, given that the PWS required the service provider to move and refuel aircraft. In *Day Zimmerman*, the protestor contended that the prospective contractor should be granted special indemnity protection due to the hazardous nature of the work (ordnance handling.) [Ref. 15] GAO stated that it is within the procuring agency's discretion to determine whether the risk warrants such protection, and denied the protest.

These PWS cases all reflect GAO's historical willingness to allow an agency to determine its own minimum needs. The procuring agency must act reasonably in allocating risk and disclose all pertinent information in its solicitation.

5. Analysis of Contracting Issues

The researcher has defined Contracting Issues as those protest matters related to traditional (i.e. non-A-76) procurement issues, other than those covered under PWS Issues above. Pertinent cases are discussed below.

In *J&E Associates*, the protestor argued that its technical proposal was misevaluated, resulting in the selection of another firm as private sector challenger in the A-76 competition. [Ref. 27] The protestor contended that the procuring agency improperly downgraded its proposal in the areas of organizational structure and staffing plan. GAO denied the protest on this issue. GAO found that the procuring agency's evaluation was reasonable and consistent with the evaluation factors disclosed in the solicitation. In *PharmChem*, the protestor alleged that the procuring agency improperly evaluated private sector technical proposals, arguing that its own offer was improperly downgraded, and that a competitor's offer was rated too high. [Ref. 41] GAO denied the protest on this issue, finding that the procuring agency properly evaluated proposals in accordance with the solicitation criteria.

In *Gemini*, the protestor argued that the procuring agency improperly evaluated the protestor's staffing against an undisclosed (in the solicitation) staffing estimate. [Ref. 20] GAO stated that the procuring agency had the right to use an undisclosed staffing estimate for evaluation, given that the solicitation notified offerors that staffing would be evaluated, and given that the procuring agency did consider the unique features of the protestor's proposal in assessing the firm's staffing approach. GAO accordingly denied the protest on this issue. In *IT Facility Services*, the protestor objected to the procuring agency's determination that the protestor's staffing was insufficient. [Ref. 26] GAO stated that the procuring agency acted reasonably in assessing the protestor's staffing and approach to performing the PWS, and denied the protest on this issue. The protestor also alleged that the procuring agency did not conduct adequate discussions regarding the protestor's insufficient staffing. GAO denied the protest on this issue as well, finding

that the procuring agency conducted meaningful discussions, and that the agency was not required to reopen discussions when the protestor's staffing remained insufficient after final proposal revisions.

In *Johnson Controls [Feb. 13, 2001]*, the protestor alleged that the private sector firm selected for contact award had an unfair competitive advantage. [Ref. 28] GAO found that the successful firm had a proposed subcontractor who had inside information regarding the instant acquisition, based on that subcontractor's previous work on a different Government contract for related services. GAO stated that the procuring agency took no action to mitigate the imbalance, and therefore sustained the protest on this issue. In *AHNTECH*, the protestor contended that the procuring agency improperly eliminated the protestor from the competitive range due to insufficient staffing. [Ref. 6] GAO denied the protest on this issue, finding that the agency had the right to evaluate staffing against an undisclosed staffing estimate. In *Consolidated Engineering*, the protestor argued against the elimination of its proposal due to the procuring agency's assignment of a poor past performance rating. [Ref. 12] GAO found that the procuring agency had assigned a rating of "little confidence" to the protestor's past performance. However, the agency later admitted that the "little confidence" rating amounted to an acceptable rating in the evaluation scheme used, and had no coherent explanation as to why the protestor's proposal was eliminated on that basis. [Ref. 12 p. 9] GAO accordingly sustained the protest on this issue.

In these contracting cases, GAO reiterated some of its common standards used to assess the propriety of the procuring agency's actions. GAO examines each case to determine if the agency evaluated proposals in the manner that was communicated to industry in the solicitation, and if the protestor was treated fairly and consistently in the evaluation process. In *J&E Associates* and in *PharmChem*, GAO found that the procuring agency followed the solicitation evaluation criteria, and evaluated offers in a reasonable and consistent manner. Conversely, in *Consolidated Engineering*, the procuring agency failed to follow its own evaluation scheme, resulting in a protest loss for the Government.

Another common theme in these cases is the high incidence of protests over the evaluation of private sector staffing proposals. GAO established that the procuring agency had the right to evaluate proposed staffing against an undisclosed Government staffing estimate, provided that the solicitation cited staffing as an evaluation factor. GAO also considered whether or not the agency properly considered any differences or unique features in a firm's staffing and approach, in assessing whether the amount of staffing proposed was sufficient to perform the PWS requirements. (In a performance based PWS, the procuring agency does not mandate overall staffing levels, nor disclose its estimate of needed staffing. Rather, the PWS includes required tasks and performance standards, and the solicitation directs the Government MP and private sector offerors to propose staffing that they believe is necessary to perform the services.)

6. Analysis of Legal/GAO Procedural Issues

The researcher has defined Legal/GAO Procedural Issues as those protest matters related to legal process considerations, such as the timeliness of the protest or GAO's legal jurisdiction to hear a particular protest or issue. Pertinent cases are discussed below.

In *PharmChem*, the protestor objected to the procuring agency's use of non-cost factors to select the private sector challenger in an A-76 competition. [Ref. 41] GAO stated that the protest was untimely, as the protestor had a duty to object to the solicitation provisions prior to the closing deadline for receipt of offers. The protestor also alleged that the procuring agency violated A-76 rules in not determining the existing contract price unreasonable, before proceeding with an A-76 acquisition for the same services. GAO stated that the protest was untimely on this issue as well, as the protestor had a duty to object to the issuance of the A-76 solicitation prior to the closing deadline. GAO thus denied the protests on both of these issues. This same protestor further contended that the procuring agency failed to utilize best value trade off criteria in conducting the Government MP versus private sector challenger cost comparison. GAO found that the protestor was not an interested party on this issue, as it was not the successful private sector offeror, and therefore was not permitted to file a protest on this basis. Accordingly, GAO denied the protest on this issue. (GAO will not sustain a

protest unless the protestor was prejudiced by the procuring agency's actions. [Ref. 41] In PharmChem's case, even if GAO had found that the procuring agency improperly conducted the Government MP versus private sector challenger cost comparison, PharmChem would not stand to benefit (i.e. gain a chance for contract award.) PharmChem was not the firm selected as the private sector challenger, and would not have any chance of being selected as such regardless of the propriety of the cost comparison.)

In *Omni*, the protestor alleged that the procuring agency conducted misleading discussions, resulting in the selection of a different firm as the private sector challenger in an A-76 acquisition. [Ref. 39] GAO dismissed the protest, stating that the protestor must first attend the procuring agency's offered post-award debriefing, before the protestor may file a bid protest at GAO. In *American Federation of Government Employees (AFGE)*, the protestor (a Government employee union organization) protested the award of a contract resulting from an A-76 acquisition. [Ref. 7] GAO stated that the Government's MP was not an offer, and that no contract would result from an A-76 decision to retain the work in-house; therefore neither the Government employees in the Most Efficient Organization (MEO) nor their union were "interested parties" under law. Only interested parties may protest at GAO, thus AFGE was not permitted to file a protest. GAO therefore dismissed the protest on this issue.

The common theme in these cases is GAO's insistence that the protestor take action in accordance with the deadlines set forth in the FAR and in case law. For example, any objection to solicitation provisions, or to the issuance of the solicitation itself, must be filed at GAO before the closing deadline for receipt of offers. The other common thread is that GAO applies the same strict timeliness standards to A-76 acquisitions and to issues contained within those A-76 procurements as they do to traditional non-A-76 acquisitions.

D. CHAPTER SUMMARY

This chapter provided an analysis of the data that was presented in Chapter III. The researcher first analyzed the General Accounting Office (GAO) bid protest case data

(i.e. that data arrayed on an overall case-by-case basis.) The researcher then analyzed the issue data within each of the five issue categories (i.e. that data arrayed using the topical issue categories previously identified.) Within each issue category, common themes, trends, and problems were identified and discussed.

The next chapter will provide short- and long-term recommendations, answers to the research questions, and suggestions for areas of further research.

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V. CONCLUSIONS AND RECOMMENDATIONS

A. OVERVIEW

This chapter will present the researcher's conclusions drawn from the investigation and analysis of the General Accounting Office (GAO) bid protest decisions on Office of Management and Budget (OMB) A-76 competitive sourcing acquisitions. Recommendations derived from these conclusions will be provided. The researcher will provide answers to the research questions posed in the first chapter of the thesis, followed by suggestions for areas of further research.

B. CONCLUSIONS

A-76 studies are seen as an effective method to expose the federal workforce to the forces of market competition. An activity undergoing study must streamline its processes, reorganize its workforce along newer, more efficient lines, and thereby save operational dollars without sacrificing the quality of services. A-76 studies will continue to be conducted on a large scale. President Bush has set a goal for federal agencies to complete A-76 studies on approximately 425,000 Government positions by the end of fiscal year 2004. Therefore, it is important to examine A-76 protests and protest losses, in order to avoid future protests, or successfully defend against protests that are filed.

A significant number of A-76 procurements are protested. For example, between 1995 and 2000, the Department of Defense (DoD) conducted 286 studies. [Ref. 54 p. 4] During that same period, this thesis identified 21 protests lodged. Thus, over seven percent of those A-76 acquisitions were protested.

During the period covered by the thesis (February 1996 through December 2002), the overall Government "win rate" (i.e. the Government procuring agency successfully won or defended the protest) at GAO for all bid protest actions was approximately 80 percent. [Ref. 72] During the same period, the Government win rate for all A-76 bid protests examined in this thesis was only 59 percent. The Government loses a significantly higher percentage of A-76 bid protests (41%) compared to its loss rate on all protests overall (20%.)

The GAO case data were examined to determine what effect (if any) a variety of case parameters had on the outcome of the A-76 protest actions. The parameters used to analyze the case data included: study type (full study, direct conversion, etc.); protest type (award protest or pre-award protest); private sector source selection strategy (best value trade-off, low price technically acceptable (LPTA), sealed bid, or sole source); agency under study; and, year of protest action.

The study type had no observable effect on the Government win rate at GAO. Under protest type, the Government had a better win rate (67%) on pre-award protests compared to the win rate for A-76 protests overall (59%.) This higher win rate for pre-award protests was attributable to a lower incidence of problematic A-76 issues, and a higher incidence of easily defended challenges to the Government's determination of its minimum needs. Under the various private sector source selection strategies, the Government had a better win rate (80%) on LPTA source selection protests compared to the win rate for A-76 protests overall (59%.) This higher win rate for LPTA source selection protests was attributable to a lower incidence of problematic A-76 issues, and particularly due to the absence of any A-76 Process – Balancing Issues. Within the case data categories of protests by procuring agency and protests by year, the data suggested that the Government win rates were driven by the varying percentages of the more problematic A-76 protest issues, and not by the identity of the procuring agency that conducted the acquisition nor by the year of the protest. Overall, the types of issues within the cases, and the difficulty in defending those various issues, drove the Government's A-76 bid protest win rate.

The researcher then examined the Government win rate in each of five "issue categories", which were established by the researcher based on an initial examination of the protests. The issue categories were: A-76 Process Issues; A-76 Process – Balancing Issues; Performance Work Statement (PWS) Issues; Contracting Issues; and, Legal/GAO Procedural Issues. The first two categories cover issues unique to A-76 procurements. The latter three categories cover traditional issues (i.e. issues not directly related to A-76 acquisitions.)

The two issue categories unique to A-76 acquisitions, "A-76 Process Issues" and "A-76 Process – Balancing Issues", had relatively low Government win rates (58 percent

and 20 percent respectively.) The remaining three issue categories, those not directly related to A-76 acquisitions, “PWS Issues”, “Contracting Issues”, and “Legal/GAO Procedural Issues”, had relatively high Government win rates (100 percent, 72 percent, and 100 percent respectively.) Procuring agencies have had difficulty defending their actions in issues unique to A-76 procurements.

The researcher then analyzed each issue category via an examination of representative protests in each category. The A-76 Process Issues were further subdivided into four topical groupings: issues related to Government Management (MP) compliance with the performance work statement (PWS) and proper costing of the MP; application of A-76 Revised Supplemental Handbook (RSH) cost adjustment factors; applicability of A-76 rules, procedures and processes; and, ethics/conflict of interest considerations.

There were several themes common to a number of protest issues related to the Government MP. Most of the instances of alleged or actual MP non-compliance revolved around sufficiency of staffing, particularly problems with both key personnel requirements and with non-Most Efficient Organization (MEO) support. Key personnel requirements created problems with MP compliance regarding the number of hours proposed, and also created problems regarding the ability of proposed MP key personnel to meet PWS minimum standards for education and experience. In several cases, the Government MP failed to account for supporting in-house staff within the MEO, or failed to include the costs of that non-MEO support in the Government In-House Cost Estimate (IHCE.) Another theme that emerged was GAO’s focus on consistent treatment of the Government MP and the private sector challenger. Both the Government MP and the private sector challenger must be held to the same PWS standards. Regardless of whether the issue was related to staffing, government-furnished facilities, or other technical and cost issues, GAO required that both parties in the A-76 competition be treated consistently to insure a fair Government versus contractor cost comparison. This emphasis on fairness in the cost comparison phase (Government versus contractor) echoed GAO’s historical approach when evaluating competing private offers under non-A-76 procurements. GAO also made clear that under a performance based PWS, the Government MP may be acceptable, even if it provides a very different staffing and

technical approach from that of the private sector challenger. This was consistent with GAO's position that acceptable staffing levels and technical approaches may vary among private sector offerors as well. Similar to traditional non-A-76 procurement, GAO's decisions emphasized the need for the procuring agency to follow the evaluation scheme set forth in the solicitation, and to appropriately and thoroughly document its actions in the contract file. As part of that documentation, the GAO decisions clearly indicated that the procuring agency's source selection authority (SSA) is fully responsible for insuring that the Government MP can meet PWS requirements, even though the A-76 RSH charges the requiring activity's "Independent Review Officer (IRO)" with performing this function.

In A-76 RSH cost adjustment issues, GAO again considered whether or not the procuring agency treated the Government MP and the private sector challenger consistently and fairly. The other major theme was GAO's examination of whether or not the procuring agency followed required processes in calculating and applying the various A-76 RSH cost adjustment factors, and whether or not any required subjective judgments were reasonably based and coherently recorded in the contract file.

Two types of protest issues were included in the A-76 rules, procedures and processes topical grouping. The first related to the overall applicability of the A-76 policy to specific Government acquisitions. GAO generally allowed the executive agencies to determine applicability. The second set of issues related to the proper application of various A-76 rules, practices, and policies, within acquisitions that were processed under A-76 procedures. GAO examined the cases to insure that procedures set forth in the RSH were properly followed. GAO also allowed the procuring agency some room for flexibility and took a common-sense approach in several cases. GAO carefully considered whether the procuring agency's actions created an unfair competition, or caused an inconsistency in the treatment of the private sector challenger compared to the Government MP.

There are several common themes that ran through the protests in the ethics/conflict of interest topical grouping. Both Government employees conducting A-76 studies, as well as the support contractors who assist them, were bound by Federal Acquisition Regulation (FAR) conflict of interest rules. GAO first looked to see if a

conflict or an appearance of conflict was present. If so, GAO then went on to consider whether or not the protestor was impacted or harmed as a result. GAO clearly established that employees whose jobs were undergoing A-76 study could not participate in the evaluation of private sector proposals. However, GAO found no conflict where the Government employee technical evaluators were in the department being studied, but were not in direct danger of losing their jobs. GAO also established that the same individual/s could not serve on both the PWS team and the Government MP team.

In a number of the A-76 Process – Balancing Issue cases, the procuring agency failed to follow the required A-76 RSH balancing process, either completely failing to consider the need for balancing, or failing to consider the potential impact of private sector challenger enhancements in performing the balancing step. In some cases, the agency did not properly document and support the analysis and rationale utilized in the balancing phase. The *Integrity Management* and *Sodexo* protests provided a sharp counterpoint. In each of those acquisitions, the procuring agency fully considered the need for technical balancing. The agency’s written analysis thoroughly documented its leveling review and the rationale for the conclusions reached. In *Integrity Management*, the SSA specifically advised the (eventual) protestor during discussions that he found no evidence of increases in performance or performance quality beyond that required by the PWS, giving the firm the opportunity to rebut the SSA’s position, and/or improve the firm’s technical proposal. [Ref. 23 p. 5]

The PWS Issue cases all reflected GAO’s historical willingness to allow an agency to determine its own minimum needs. The procuring agency must act reasonably in allocating risk and disclose all pertinent information in its solicitation.

In the Contracting Issue cases, GAO reiterated some of its common standards used to assess the propriety of the procuring agency’s actions. GAO examined each case to determine if the agency evaluated proposals in the manner that was communicated to industry in the solicitation, and if the protestor was treated fairly and consistently in the evaluation process. Another common theme in these cases was the high incidence of protests over the evaluation of private sector staffing proposals. GAO established that the procuring agency had the right to evaluate proposed staffing against an undisclosed

Government staffing estimate, provided that the solicitation cited staffing as an evaluation factor. GAO also considered whether or not the agency properly considered any differences or unique features in a firm's staffing and approach, in assessing whether the amount of staffing proposed was sufficient to perform the PWS requirements.

The common theme in the Legal/GAO Procedural Issue cases was GAO's insistence that the protestor take action in accordance with the deadlines set forth in the FAR and in case law. For example, any objection to solicitation provisions, or to the issuance of the solicitation itself, must be filed at GAO before the closing deadline for receipt of offers. The other common thread was that GAO applied the same strict timeliness standards to A-76 acquisitions, and to issues contained within those A-76 procurements, as they did to traditional non-A-76 acquisitions.

C. RECOMMENDATIONS

1. Improve Communications Between Acquisition Personnel, Requiring Activity Personnel, and Industry

The procuring agency contracting officer must take the lead in coordinating the interests of the various stakeholders in an A-76 competition. It is essential that the contracting officer communicate critical information up front to the requiring activity (i.e. the Government activity being studied.) The requiring activity is usually the source for Source Selection Evaluation Board (SSEB) members, PWS Team members, and Government MP Team members. The contracting officer must explain the prohibition against dual membership on both the MP and PWS teams, the prohibition against dual membership on both the MP and SSEB teams, and the limited role that may be played by employees whose positions are part of the A-76 study. The contracting officer should encourage questions regarding any specific issues relative to team membership, and seek the advice of legal counsel as needed. This will avoid conflicts of interest as the A-76 acquisition proceeds, and also allows maximum time for the requiring activity to assemble personnel with the necessary knowledge for each team.

The contracting officer must also take the lead in improving communications with industry and with the Government MP team. Conducting pre-solicitation conferences with industry and the Government MP team to explain the A-76 requirement may help to identify inconsistencies, ambiguities, or other problems in the PWS or the associated historical workload. The draft PWS should be publicly posted to the Internet for industry and MP team comments and questions. This technique is often more effective than the pre-solicitation conference, as firms may be more likely to submit critiques and suggestions privately to the contracting officer. In addition to improving the final solicitation, early publication of the draft PWS reduces the chance that the Government MP team will gain advance information that is not yet available to the potential private sector offerors.

Throughout the A-76 acquisition process, the contracting officer must maintain an open dialogue with industry and Government stakeholders. Questions from industry or the MP team regarding the issued solicitation must be thoroughly investigated, answered as appropriate, and communicated equally to potential private sector offerors and to the Government MP team. Full disclosure of pertinent data to all parties on an equal basis will preclude situations of alleged unfair or unequal treatment.

2. Focus on Specific Areas in Performance Work Statement (PWS) Preparation and Review

A-76 professionals have long recognized the need to carefully prepare performance work statements that are clear and unambiguous, and that fully describe the types and quantities of tasks that must be performed. The PWS team and the contracting officer must also pay special attention to those specific PWS issues that have created problems and protests in the past. The PWS team must insure that the PWS identifies all equipment, supplies, and facilities that will be provided as Government-furnished. The contracting officer must insure that the Government MP team does not utilize, at no cost, any Government-furnished property not identified as such in the PWS. Any and all pertinent and reasonably available historical workload information must be disclosed in the solicitation. The contracting officer must be careful to insure that any pertinent

information already available to the MP team is also included in the PWS for the benefit of industry.

The use of a performance based PWS is mandatory in A-76 procurements. [Ref. 60] Use of key personnel provisions that require specific service employees/employee categories, or required numbers of hours, are discouraged under performance based service contracting (PBSC.) However, requiring activities sometimes mandate a limited amount of required positions or minimum hours for security, safety, or mission-related reasons. If (for example) a Program Manager is required, the PWS team must limit any minimum education and experience requirements. The contracting officer must remind the PWS team that the Government MP team must also meet these qualifications, and that the potential for personnel actions during MEO implementation makes it difficult for the MP team to identify a key individual up front. Thus, the MP team will not be able to pre-select a candidate to meet PWS qualifications. For this same reason, even if the PWS includes key personnel experience requirements for performance of the services, the solicitation must never request resumes as part of the technical proposal submission requirements. If the PWS will require any specified personnel, the contracting officer must also insure that terms such as “dedicated”, “full time”, and “on-site” are clearly defined, to avoid inconsistent interpretations among private offerors and the MP team.

3. Improve the Private Sector Evaluation and Source Selection Process

The contracting officer should consider limiting the amount and type of technical proposal information requested from industry. The more elaborate and lengthy the private sector technical proposals, the better the chances of the technical evaluators missing an enhancement that may require balancing of the Government MP. Even if the private sector challenger’s increases in performance or performance quality are recognized, the procuring agencies have had significant difficulties in properly conducting the balancing process. However, limiting the size of the private sector technical proposals, or the elimination of factors such as “technical approach” (under which the offeror specifically describes how it will perform PWS tasks), may reduce the chances of generating innovative ideas from industry. The requiring activity and the contracting officer must jointly determine the extent and type of private sector technical

proposal information required, depending on the particular circumstances of the A-76 acquisition.

The contracting officer should inform private sector offerors in the solicitation evaluation section that their proposals will be examined for increases in performance or performance quality beyond the requirements of the PWS. The solicitation should require offerors to specifically point out areas in their proposal where the firm believes it has proposed such enhancements. The SSEB's technical evaluation of private sector offerors should identify any areas of enhanced performance or quality, or specifically state that no such increases were noted. If competitive discussions are conducted in negotiated procurements, the contracting officer should inform firms whether or not the procuring agency has identified any performance or quality enhancements. These actions will help the contracting officer in determining the need for balancing, and conducting the balancing process if required. They will also help the contracting officer in the event that a firm later takes issue with the Government's evaluation of the offeror's proposal.

As in any solicitation, the contracting officer must take great care in A-76 procurements to insure that the solicitation evaluation criteria are followed, the rating and ranking of private sector proposals and the resultant source selection is thoroughly documented, and the private sector offerors are treated consistently and fairly. The contracting officer must take special care in the evaluation of private sector staffing proposals. The unique approach or particular staffing mix of each offeror must be considered, when comparing the firm's staffing proposal to the Government's estimate of required staffing, in order to determine acceptability and assign an appropriate rating.

4. Improve the Government Management Plan (MP), Technical Balancing, and Cost Comparison Processes

The contracting officer must insure that the Government MP is prepared in accordance with the requirements of the A-76 RSH. Although the contracting officer cannot review the Government MP until late in the overall A-76 process, she must query the MP team up front regarding the possible use of any non-appropriated fund (NAFI) or volunteer personnel in the MEO. Volunteer or other no-cost labor is prohibited, and any significant use of NAFI personnel must be disclosed to industry in the solicitation, to

insure a fair competition. The contracting officer/SSA is fully responsible for insuring that the MP technical submission meets all solicitation requirements, and must also insure that the Government IHCE is properly prepared in accordance with A-76 RSH guidelines. The contracting officer, SSA, and administrative appeal authority may utilize the SSEB or other in-house support to assist in making technical compliance determinations. The contracting officer has the right and the obligation to require correction of mistakes and request clarifications in the Government MP, regardless of when they are discovered.

The contracting officer/SSA must thoroughly examine the private sector challenger's technical proposal to determine if it contains any increases to performance or quality beyond the level required by the PWS. If any such enhancements are present, the contracting officer/SSA must carefully perform technical balancing, and insure that the Government MP makes appropriate changes in its technical and price submissions. The contracting officer/SSA should utilize the SSEB as necessary to assist in the balancing process. The contracting officer/SSA must recognize that the private sector challenger and the Government MP may have very different staffing levels or technical approaches, yet be equivalent in levels of performance and quality.

In conducting the cost comparison between the private sector challenger and the Government MP, the contracting officer must be well versed in the calculation and application of all A-76 RSH cost adjustment factors. The contracting officer must insure consistent treatment of the Government MP and all private sector offerors throughout the conduct of the entire A-76 acquisition process.

The contracting officer must conduct all of these unique A-76 portions of the acquisition process with the same care and thoroughness that was utilized in the selection of the private sector challenger. It is absolutely essential that each of these actions be carefully and thoroughly documented in the contract file. Detailed documentation can assist the contracting officer in debriefing unsuccessful firms and avoiding protests, and in defending against any protests that are filed.

5. Provide Training and Lessons Learned

On individual A-76 acquisitions, the contracting officer must provide up front training to requiring activity personnel. The activity undergoing the A-76 study must be thoroughly familiar with the rules and problem areas related to Government MP preparation, proper costing of the IHCE, and conflict of interest prohibitions. Requiring activity personnel must have a general understanding of the A-76 procurement process, and how their participation fits into that process. Providing this working knowledge at the start of the A-76 acquisition will help avoid later problems. The contracting officer must remain available to answer questions from the PWS team, Government MP team, SSEB, and other stakeholders throughout the A-76 process.

Formal A-76 training must also be provided to requiring activity and procuring agency personnel. Prospective requiring activity team members must be intimately familiar with the duties of their team, and the rules and processes that must be followed. Contracting personnel need to gain an understanding of the entire A-76 process, not just the “contracting” portions. This will become increasingly important, as the contracting officer will likely have increased responsibilities for review of the PWS and Government MP in the future, once the new revised A-76 circular is issued.

A-76 personnel, and particularly contracting personnel, must continue to share lessons learned and best practices regarding the complex issues of private sector source selection, technical performance balancing, and the various steps in calculating and finalizing the Government MP versus private sector challenger cost comparison. Contracting and legal personnel must closely follow any changes in policy or regulations, and pay particular attention to all GAO bid protest decisions concerning A-76 acquisitions.

D. ANSWERS TO THE RESEARCH QUESTIONS

1. Primary Research Question

The primary research question was: “What common issues and trends are contained in GAO A-76 bid protests, and what acquisition planning and process actions may be taken to alleviate future problems?”

The primary research question is answered by means of the responses provided to the following subsidiary research questions.

2. Subsidiary Research Question Number One

Subsidiary Research Question Number One was: “How numerous are the GAO protests lodged against A-76 studies?”

During the period covered by the thesis (5 February 1996 through 23 December 2002), 46 A-76 bid protests were filed at GAO. Overall, a significant percentage of A-76 procurements are protested. For example, between 1995 and 2000, the Department of Defense (DoD) conducted 286 A-76 studies. [Ref. 54 p. 4] During that same period, this thesis identified 21 protests lodged. Thus, over seven percent of those A-76 acquisitions were protested.

3. Subsidiary Research Question Number Two

Subsidiary Research Question Number Two was: “What are the underlying causes of these protests, and what factors affect the success or failure of the protests?”

The issues that were contested in the A-76 protests were identified and categorized into the following issue categories: A-76 Process Issues; A-76 Process – Balancing Issues; Performance Work Statement (PWS) Issues; Contracting Issues; and, Legal/GAO Procedural Issues. The first two categories cover issues unique to A-76 procurements. The latter three categories cover traditional issues (i.e. issues not directly related to A-76 acquisitions.) The two issue categories unique to A-76 acquisitions, “A-76 Process Issues” and “A-76 Process – Balancing Issues”, had relatively low Government win rates (58 percent and 20 percent respectively.) The remaining three issue categories, those not directly related to A-76 acquisitions, “PWS Issues”, “Contracting Issues”, and “Legal/GAO Procedural Issues”, had relatively high

Government win rates (100 percent, 72 percent, and 100 percent respectively.) Procuring agencies have had difficulty defending their actions in issues unique to A-76 procurements.

The GAO case data were examined to determine what effect (if any) a variety of case parameters had on the outcome of the A-76 protest actions. The parameters used to analyze the case data included: study type (full study, direct conversion, etc.); protest type (award protest or pre-award protest); private sector source selection strategy (best value trade-off, low price technically acceptable (LPTA), sealed bid, or sole source); agency under study; and, year of protest action. Within the case data categories, the data suggested that the Government win rates at GAO were driven by the presence and varying percentages of the more problematic A-76 protest issues, and not because of the case data parameters. Overall, the types of issues within the cases, and the difficulty in defending those various issues, drove the Government's A-76 bid protest win rate.

4. Subsidiary Research Question Number Three

Subsidiary Research Question Number Three was: "What are the common issues, themes, or trends associated with these protests?"

The thesis identified a number of common themes, issues, and trends. There were a number of protest issues related to the Government MP compliance with the PWS. Another theme that emerged was GAO's focus on consistent treatment of the Government MP and the private sector challenger. This emphasis on fairness in the cost comparison phase (Government versus contractor) echoed GAO's historical approach when evaluating competing private offers under non-A-76 procurements. Similar to traditional non-A-76 procurement, GAO's decisions emphasized the need for the procuring agency to follow the evaluation scheme set forth in the solicitation, and to appropriately and thoroughly document its actions in the contract file. GAO examined the cases to insure that procedures set forth in the RSH were properly followed.

GAO clearly established that employees whose jobs were undergoing A-76 study could not participate in the evaluation of private sector proposals. However, GAO found no conflict where the Government employee technical evaluators were in the department being studied, but were not in direct danger of losing their jobs. GAO also established

that the same individual/s could not serve on both the PWS team and the Government MP team.

In a number of the A-76 Process – Balancing Issue cases, the procuring agency failed to follow the required A-76 RSH balancing process, either completely failing to consider the need for balancing, or failing to consider the potential impact of private sector challenger enhancements in performing the balancing step.

5. Subsidiary Research Question Number Four

Subsidiary Research Question Number Four was: “What acquisition planning and process actions may be taken to alleviate future problems, particularly in light of the new OMB procedures?”

The researcher provided five recommendations for A-76 process improvement: (1) Improve Communications Between Acquisition Personnel, Requiring Activity Personnel, and Industry; (2) Focus on Specific Areas in Performance Work Statement (PWS) Preparation and Review; (3) Improve the Private sector Evaluation and Source Selection Process; (4) Improve the Government Management Plan (MP), Technical Balancing, and Cost Comparison Processes; and, (5) Provide Training and Lessons Learned.

E. SUGGESTIONS FOR FURTHER RESEARCH

A study of future A-76 GAO bid protests should be conducted, covering protest decisions issued on or after 24 December 2002 (i.e. after the time period analyzed in this thesis.) A review of GAO A-76 bid protest decisions rendered on acquisitions conducted under the new A-76 circular (soon to be implemented) would be particularly useful, to detect any changing trends or new issues resulting from the new A-76 process.

F. SUMMARY

This thesis examined GAO A-76 bid protest decisions issued between 5 February 1996 and 23 December 2002. The cases and protest issues were analyzed, to ascertain the reasons that A-76 protests were lodged, and the reasons that the Government procuring agency lost A-76 protests. The researcher identified common themes, trends,

and key issues, and drew conclusions based on that information. Recommendations for A-76 process improvements were developed and provided.

It is the researcher's hope that the information contained in this thesis will be of benefit to A-76 personnel, particularly to Government acquisition personnel responsible for conducting A-76 competitive sourcing studies in the future.

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**APPENDIX A. SYNOPSIS OF GENERAL ACCOUNTING OFFICE A-76
BID PROTESTS
(5 February 1996 to 23 December 2002)**

This appendix contains a brief synopsis of each GAO bid protest analyzed by the researcher. The appendix provides a short description of the issue/s contained in each protest, identifies the applicable issue categories, and provides GAO's rulings on each issue and on each bid protest. The researcher developed the five issue categories and the subsequent categorization of the issues.

1. Aberdeen Technical Services, B-283727.2, February 22, 2000

Protest that Government In-House Cost Estimate (IHCE) did not include full costs of program manager and other key personnel – sustained. General Accounting Office (GAO) agreed with protestor. (A-76 Process issue)

Protest that procuring agency failed to consider potential balancing of Government Management Plan (MP) with private sector challenger firm – sustained. GAO found that procuring agency failed to consider levels of performance and performance quality of MP and private sector challenger firm. (A-76 Process – Balancing issue)

Protest that procuring agency disallowed protestor's final proposal revision (FPR) price reduction – sustained. GAO stated that procuring agency was not permitted to adjust protestor's fixed price proposal, as all risk of performance under a fixed price contract rests with the contractor. (Contracting issue)

Overall outcome – protest sustained (Government loss.)

2. AHNTECH Inc., B-291044, October 10, 2002

Protest that procuring agency improperly eliminated protestor from competitive range due to insufficient staffing – denied. GAO found that agency had the right to evaluate staffing against an undisclosed staffing estimate. (Contracting issue)

Overall outcome – protest denied (Government win.)

3. American Federation of Government Employees, B-282904.2, June 7, 2000

American Federation of Government Employees (AFGE) protested the award of a contract to a contractor based on the conduct of an A-76 study – dismissed. GAO stated that the Government’s MP was not an offer, and no contract would result from an A-76 decision to retain the work in-house; therefore neither the Government employees in the Most Efficient Organization (MEO) nor their union were “interested parties” under law. Only interested parties may protest at GAO, therefore AFGE was not permitted to file a protest. (Legal/GAO Procedural issue)

Overall outcome – protest dismissed (Government win.)

4. ANV Enterprises, Inc., B-270013, February 5, 1996

Protest that performance work statement (PWS) is ambiguous due to lack of detail, and risky due to failure of solicitation to offer equipment as Government-furnished – denied. GAO found that procuring agency disclosed all available information, and was not required to offer Government-furnished equipment merely to reduce potential contractor risk. (PWS issue)

Overall outcome – protest denied (Government win.)

5. BAE Systems, B-287189, B-287189.2, May 14, 2001

Protest that procuring agency did not determine that Government MP met the PWS requirements – sustained. GAO stated that the acquisition record did not establish that the MP met the PWS in areas of key personnel and sufficiency of staffing. (A-76 Process issue)

Protest that Government administrative appeal authority’s upward adjustments to MEO staffing were improper – sustained. GAO found that although the administrative appeal authority (in reviewing the procuring agency’s actions) did conduct technical balancing, it did not document the basis for the *amount* of staffing that was added. (A-76 Process – Balancing issue)

Protest that procuring agency failed to consider protestor’s increases to performance standards of PWS – sustained. GAO stated that the procuring agency failed to consider whether the protestor’s offer to improve timeliness of service to walk-in

customers (within 15 minutes, vice 30 minute PWS requirement) was an improvement to performance. The procuring agency therefore failed to determine whether or not balancing was required in this instance. (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

6. BMAR & Associates, Inc., B-281664, March 18, 1999

Protest that Government MP must include a Technical Performance Plan (TPP) under a two-step sealed bid A-76 procurement – denied. GAO found that a TPP is only required in a negotiated A-76 acquisition, in accordance with provisions of the Revised Supplemental Handbook (RSH.) (The MP in a sealed bid procurement must include the MEO and IHCE however.) (A-76 Process issue)

Protest that a fixed price arrangement for civil engineering work is too risky – sustained. GAO stated that the fixed monthly price approach required by the solicitation was unreasonably risky and restricted competition, as there was no limit on, and no way to reasonably estimate, the amount of routine and emergency service calls that would occur. (Contracting issue)

Overall outcome – protest sustained (Government loss.)

7. COBRO Corp., B-287578.2, October 15, 2001

Protest that procuring agency treated the Government MP and private offerors differently with respect to government-furnished facilities – sustained. GAO found that private offerors had to propose their own facilities (affecting their technical approach and cost), while the Government MP utilized existing Government facilities at no additional cost. (A-76 Process issue)

Protest that negotiated solicitation encouraged offerors to propose enhancements to the PWS, but those enhancements were not considered for potential balancing of private offeror with the Government MP – no decision. GAO stated it would not rule on this issue because protest was sustained on the merits of the first issue. However, GAO went on to state that the agency in fact did not consider the private offeror's enhancements in comparing the private offer versus MP performance quality for possible balancing. This decision is considered a Government protest loss, as it is clear that the

procuring agency's failure to consider balancing is a fatal flaw in the conduct of an A-76 acquisition (see *BAE Systems* above.) (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

**8. Consolidated Engineering Services, Inc., B-291345, B-291345.2,
December 23, 2002**

Protest against elimination of protestor's proposal due to poor past performance rating – sustained. GAO found that the procuring agency assigned a rating of "little confidence" to the protestor's past performance. However, the agency later admitted that the "little confidence" rating amounted to an acceptable rating in the evaluation scheme used, and had no coherent explanation as to why the protestor's proposal was eliminated on that basis. (Contracting issue)

Overall outcome – protest sustained (Government loss.)

**9. Crown Healthcare Laundry Services, Inc., B-270827, B-270827.2,
April 30, 1996**

Protest that procuring agency improperly evaluated the inter-service support agreement (ISSA) offer from the Department of Veterans Affairs (VA) – denied. (The A-76 RSH process also allows other government agencies to offer to perform the work.) GAO stated that the PWS was performance based, such that each offeror could decide how to staff the work and how many laundry trucks it would use, and cost its offer accordingly. Thus, GAO found that the procuring agency reasonably accepted the VA estimates. (A-76 Process issue)

Protest that procuring agency should have added the Government's cost of contract administration to the VA's ISSA cost – denied. GAO stated that the VA would do its own quality assurance, so the agency was proper in not adding the additional contract administration cost to the ISSA. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

10. Crown Support Services, Inc., B-287070, January 31, 2001

Protest of earlier denial of protestor's appeal to administrative appeal authority, contesting the outcome of the A-76 cost comparison – dismissed. GAO stated that the

protest was untimely, in that it was filed more than ten days after the initial appeal was denied. (Legal/GAO Procedural issue)

Overall outcome – protest dismissed (Government win.)

11. Day Zimmermann Hawthorne Corp., B-287121, March 30, 2001

Protest that solicitation requirement for private offeror to include insurance costs is unfair, given that Government MP does not have to include such costs – denied. GAO found that the Government is self-insured (thus no premium costs), and the A-76 RSH takes this into account by requiring that the MP include a cost addition factor to account for this discrepancy. (A-76 Process issue)

Protest that prospective contractor should be granted special indemnity protection due to hazardous nature of the work (ordnance handling) – denied. GAO stated that it is within the procuring agency’s discretion to determine whether the risk warrants such protection. (PWS issue)

Overall outcome – protest denied (Government win.)

12. Del-Jen, Inc., B-287273.2, January 23, 2002

Protest that Government MP understated its cost of administering an “embedded” subcontract (i.e. the Government MEO’s use of a private subcontractor to supplement its proposed in-house Government workforce) – sustained. GAO found that the MP did not include this cost within its overall personnel costs, as required by the A-76 RSH. (A-76 Process issue)

Protest that procuring agency added too much money to protestor’s price in calculating the price adjustment for contract administration – sustained. GAO found that the MP improperly calculated the number of full time equivalent (FTE) personnel needed to perform contract administration, thereby overstating the contract administration cost. (A-76 Process issue)

Protest that procuring agency made an improper upward adjustment to grade structure (and thus cost) of contract administration personnel during an administrative appeal – sustained. GAO stated that the mix of (relatively) highly graded personnel was inconsistent with Department of Defense (DoD) guidance. (A-76 Process issue)

Overall outcome – protest sustained (Government loss.)

**13. Department of the Navy – Reconsideration [Jones-Hill], B-286194.7,
May 29, 2002**

The Navy asked GAO to reconsider its earlier determination that the presence of the same Government employees and support contractor personnel on both the PWS team and the Government MP team constituted a conflict of interest – affirmed, but modified. GAO affirmed its earlier decision that a conflict of interest was present. However, GAO did modify its decision such that the revised conflict of interest standard would only be applied to A-76 procurements conducted after GAO’s initial conflict of interest ruling. (A-76 Process issue)

Overall outcome – protest decision affirmed (Government loss.)

14. DynCorp Technical Services LLC, B-284833.3, B-284833.4, July 17, 2001

Protest that agency improperly evaluated the cost of government furnished material – sustained. GAO stated that the procuring agency allowed the Government IHCE to deduct the cost value of government furnished material, without making the required corresponding downward adjustment to the protestor’s cost. (A-76 Process issue)

Protest that procuring agency did not properly consider the protestor’s accelerated performance schedule – sustained. GAO found that the procuring agency did not properly consider the impact of the acceleration as an increase in performance that might necessitate technical balancing. GAO stated that a generic statement regarding balancing was insufficient file documentation. (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

15. Federal Prison Industries, B-290546, July 15, 2002

Protest that procuring agency improperly found that protestor’s product was not comparable to private sector product, resulting in an award to a private contractor – dismissed. GAO cited its A-76 interpretation of “interested party” under *AFGE*, in determining that protestor was not eligible to file a GAO protest. This protest is included

in the thesis because of GAO's affirmation of its earlier ruling on what constitutes an interested party under A-76 acquisitions. (Legal/GAO Procedural issue)

Overall outcome – protest dismissed (Government win.)

16. Gemini Industries, Inc., B-281323, January 25, 1999

Protest that procuring agency improperly evaluated protestor's staffing against an undisclosed staffing estimate – denied. GAO stated that the procuring agency had the right to use an undisclosed staffing estimate for evaluation, given that solicitation notified offerors that staffing would be evaluated, and given that the procuring agency did consider any unique features in protestor's proposal. (Contracting issue)

Overall outcome – protest denied (Government win.)

17. E.L. Hamm & Associates, Inc., B-290783, B-290783.2, September 30, 2002

Protest that procuring agency improperly evaluated protestor's proposal as unacceptable – denied. GAO found that procuring agency conducted a proper evaluation and appropriately documented the results. (Contracting issue)

Overall outcome – protest denied (Government win.)

18. Imaging Systems Technology, B-283817.3, December 19, 2000

Protest that procuring agency failed to utilize A-76 procedures, where the agency cancelled a non-A-76 solicitation after determining that in-house personnel could perform the work at less cost– denied. GAO stated that non-use of A-76 may have violated agency policy, but given that the solicitation was not issued under A-76 procedures, there was no valid basis for this aspect of the protest. (A-76 Process issue)

Protest that procuring agency did not consider all Government in-house costs in determining that in-house performance was more economical – sustained. GAO found that the procuring agency did not consider the costs of in-house labor support provided from remote locations (locations physically separate from the primary location of services), and that therefore the agency's conclusion was unreasonable. (A-76 Process issue)

Overall outcome – protest sustained (Government loss.)

19. Integrity Management Enterprises, Inc., B-290193, B-290193.2,

June 25, 2002

Protest that procuring agency improperly amended the solicitation after the closing deadline for receipt of offers, based upon review of the technical portion of the Government MP – denied. GAO stated that the agency had the right to alter the PWS to reflect its minimum needs, and that the changes were properly communicated to private sector offerors via amendment. (A-76 Process issue)

Protest that government MP was not capable of performing the PWS and did not cover all necessary costs of performance – denied. GAO found that the source selection authority (SSA) sought the assistance of the technical evaluation board to insure that Government MP was capable of performing. (A-76 Process issue)

Protest that the protestor’s proposal provides a higher level of performance than the Government MP – denied. GAO stated that the procuring agency thoroughly reviewed both technical submissions and properly concluded that no technical balancing was required. (A-76 Process – Balancing issue)

Overall outcome – protest denied (Government win.)

20. IT Corporation, B-288507, September 7, 2001

Protest that procuring agency failed to address concerns regarding the inability of the Government MP to perform solicitation requirements – dismissed. GAO stated that the protestor’s earlier appeal to the administrative appeal authority was found to have merit, and the procuring agency had committed to take corrective action. However, because the procuring agency stated that it had not yet implemented corrective action, the protest was dismissed as premature. Notwithstanding the dismissal, this decision is considered a Government protest loss, as GAO essentially endorsed the findings of the administrative appeal authority (i.e. that the procuring agency made errors in conducting the A-76 cost comparison.) (A-76 Process issue)

Overall outcome – protest dismissed (Government loss.)

21. IT Corporation, B-289517.3, July 10, 2002

(This is a different A-76 acquisition from the case identified immediately above.)

Protest that procuring agency improperly cancelled solicitation – denied. GAO stated that the agency discovered that the solicitation’s historical workload was inaccurate, and that the procuring agency has broad authority to determine its requirements. Thus, the agency’s solicitation cancellation was reasonable. (Contracting issue)

Overall outcome – protest denied (Government win.)

22. IT Facility Services-Joint Venture, B-285841, October 17, 2000

Protest that presence on source selection evaluation board (SSEB) of Government employees who were in the function under A-76 study created a conflict of interest – denied. GAO found no conflict, because the positions of the employees in question were not included in the A-76 study (although the employees were located in the functional department being studied.) (A-76 Process issue)

Protest that a conflict of interest existed where the spouse of one of the SSEB evaluators was in a position undergoing A-76 study – denied. GAO stated that an appearance of conflict of interest did exist. However, SSEB evaluation worksheets showed that if that evaluator’s rating were eliminated, protestor would still have been rated technically unacceptable. Thus, the protestor was not harmed by the conflict of interest. (A-76 Process issue)

Protest that the procuring agency’s use of the same support contractor to assist in both the preparation of the Government’s MP as well as the evaluation of private sector offers was improper – denied. GAO found that the support contractor had implemented adequate “firewall” protection (i.e. the support contractor utilized different personnel for the two support tasks and did not allow information to pass from either group to the other.) (A-76 Process issue)

Protest objecting to determination that protestor’s staffing was insufficient – denied. GAO stated that procuring agency acted reasonably in assessing protestor’s staffing and approach to performing the PWS. (Contracting issue)

Protest that procuring agency did not conduct adequate discussions regarding protestor's insufficient staffing – denied. GAO found that agency conducted meaningful discussions, and that procuring agency was not required to reopen discussions when protestor's staffing remained insufficient after final proposal revisions. (Contracting issue)

Overall outcome – protest denied (Government win.)

23. J&E Associates, Inc., B-278187, January 5, 1998

Protest that protestor's technical proposal was misevaluated, resulting in selection of another firm as private sector challenger in the A-76 competition – denied. GAO found that the procuring agency's evaluation was reasonable and consistent with the evaluation factors disclosed in the solicitation. (Contracting issue)

Overall outcome – protest denied (Government win.)

24. Johnson Controls World Services, Inc., B-286714.2, February 13, 2001

Protest that private sector firm selected for contact award had an unfair competitive advantage – sustained. GAO stated that successful firm had a subcontractor who had inside information regarding the instant acquisition, based on that subcontractor's work on a different Government contract for related work. GAO found that the procuring agency took no action to mitigate the imbalance. (Contracting issue)

Overall outcome – protest sustained (Government loss.)

25. Johnson Controls World Services, Inc., B-288636, B-288636.2,

November 23, 2001

(This is a different A-76 acquisition from the case identified immediately above.)

Protest that Government MP failed to compare all the MEO positions with the current positions in the existing in-house workforce – denied. GAO stated that there was no requirement to conduct a position-by-position comparison. (A-76 Process issue)

Protest that Government IHCE did not cost out all the positions in the MEO – denied. GAO found that the procuring agency properly concluded that the Government MP had identified and cost all MEO positions. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

26. Jones/Hill Joint Venture – Reconsideration, B-286194.2, December 8, 2000

(This protest concerns the same A-76 acquisition referenced in case Number 13 above and in case Number 27 immediately below.)

Protest that procuring agency’s A-76 decision that it would be more economical to retain performance of services in-house is improper – dismissed. GAO stated that procuring agency was in process of instituting corrective action in response to earlier protest, thus this instant protest was dismissed as academic. However, this decision is considered a Government protest loss, as GAO confirmed that the procuring agency made errors in conducting the A-76 cost comparison, specifically in not considering the protestor’s technical enhancements as issues possibly requiring technical balancing. (A-76 Process – Balancing issue)

Overall outcome – protest dismissed (Government loss.)

**27. Jones/Hill Joint Venture, B-286194.4, B-286194.5, B-286194.6,
December 5, 2001**

Protest that the presence of the same Government employees and support contractor personnel on both the PWS team and the Government MP team constituted a conflict of interest – sustained. GAO found that the Government MP team had an unfair competitive advantage due to the information available to those MP team members who also participated in the PWS team. (A-76 Process issue)

Protest that the Government MP could not fully perform the PWS and did not include all costs necessary for performance – sustained. GAO stated that the procuring agency did not document its determination that the MEO staffing could perform the PWS requirements. (A-76 Process issue)

Protest that Government MP did not offer the same level of performance and performance quality as the protestor’s proposal – sustained. GAO found that several enhancements identified in the evaluation of the protestor’s technical proposal were not considered during the balancing phase of the cost comparison. (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

28. Lackland 21st Century Services Consolidated, B-285938.6, July 13, 2001

Protest that procuring agency's A-76 decision that it would be more economical to retain performance of services in-house is improper – dismissed. GAO stated that procuring agency was in process of instituting corrective action in response to earlier protest, thus this instant protest was dismissed as academic. However, this decision is considered a Government protest loss, as GAO confirmed that the procuring agency admitted that there were significant errors in the Government MP, sufficient to warrant corrective action, possibly leading to a reversal of the A-76 cost comparison decision. (A-76 Process issue)

Overall outcome – protest dismissed (Government loss.)

29. Lackland 21st Century Services Consolidated, B-285938.7, B-285938.8, December 4, 2001

(This protest concerns the same A-76 acquisition referenced in case Number 28 immediately above.)

Protest that it was improper for procuring agency to utilize its in-house audit staff to review the cost comparison decision – denied. GAO found nothing improper in the agency's actions, especially considering that the acquisition had already been protested on an earlier occasion. (A-76 Process issue)

Protest that procuring agency improperly canceled solicitation and reinitiated A-76 solicitation process – denied. GAO stated that the agency discovered problems with the solicitation, and that the procuring agency has broad discretion to cancel any solicitation. (Contracting issue)

Overall outcome – protest denied (Government win.)

30. LBM Inc., B-286271, December 1, 2000

Protest against requirement that private offerors must be certified to ISO-9000 quality standards not later than the start date of contract services – denied. GAO found

that the procuring agency acted reasonably in imposing the quality requirement, given that the PWS requires the service provider to move and refuel aircraft. (PWS issue)

Overall outcome – protest denied (Government win.)

31. Madison Services, Inc., B-277614, November 3, 1997

Protest that procuring agency violated the A-76 process by allowing Government MP team to change its IHCE after agency's evaluation of protestor's proposal – denied. GAO stated that the procuring agency properly allowed the correction of a mistake in the IHCE (i.e. the failure to initially include certain material and supply costs), and found no evidence that the agency improperly used any insights gained from review of protestor's proposal. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

32. Morrison Knudsen Corp., B-281224, January 12, 1999

Protest that a conflict of interest occurred where 14 out of 16 procuring agency evaluators charged with evaluating private sector offers held positions that were under study via the same A-76 acquisition – sustained. GAO found an obvious conflict of interest that tainted the procuring agency's determination that all private sector offers were unacceptable. (A-76 Process issue)

Overall outcome – protest sustained (Government loss.)

33. N&N Travel & Tours, Inc., B-285164.2, B-285164.3, August 31, 2000

Protest that issuance of a task order violated A-76 policy, in that a competitive solicitation under A-76 procedures should have been issued – denied. GAO stated that it had no basis to question the procuring agency's failure to utilize A-76 procedures, as no competitive solicitation was issued. (A-76 Process issue)

Protest that procuring agency's action violated Federal Acquisition Regulation (FAR) rules regarding small business set asides – sustained. GAO found that procuring agency was required to set aside the requirement for small business, given that there was a reasonable expectation of receiving offers from at least two small businesses capable of performance. (Contracting issue)

Overall outcome – protest sustained (Government loss.)

34. NVT Technologies, Inc., B-289087, January 3, 2002

Protest that Government IHCE did not utilize standard material “plug-in costs” (i.e. estimated costs stated in the solicitation that all private sector offerors were required to utilize) – denied. GAO stated that the Government did include material costs, calculated based on the solicitation’s historical workload, that were in fact higher than the material plug-in amounts. (A-76 Process issue)

Protest that Government MP did not cost out all safety, quality, and repair PWS requirements – denied. GAO found that the protestor merely disagreed with the MEO staffing quantities and resulting IHCE costs calculated in the Government MP, and that the MP did consider all PWS functions. (A-76 Process issue)

Protest that the contract administration adjustment costs added to the protestor’s price were too high, due to use of an excessive employee grade structure and mix – denied. GAO stated that the protestor did not show that the procuring agency’s explanation of the grade structure utilized was unreasonable. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

35. Omni Corp., B-281082, December 22, 1998

Protest that procuring agency conducted misleading discussions resulting in selection of a different firm as private sector challenger in an A-76 acquisition – dismissed. GAO stated that the protestor must first attend the procuring agency’s offered post-award debriefing, before the protestor may file a bid protest at GAO. (Legal/GAO Procedural issue)

Overall outcome – protest dismissed (Government win.)

36. Pacific Support Group, LLC, B-290467, August 8, 2002

Protest against changes to Government MEO required by the administrative appeal authority – denied. GAO found that the procuring agency acted properly, in that it was permissible for the administrative appeal authority to order changes to the MEO. (A-76 Process issue)

Protest that Government MEO staffing does not meet PWS requirements – denied. GAO stated that there was no evidence that the Government MP approach for meeting PWS requirements was unreasonable. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

37. PharmChem Laboratories, Inc., B-280988, B-280988.2, December 17, 1998

Protest that procuring agency improperly evaluated private sector technical proposals – denied. GAO found that the procuring agency properly evaluated proposals in accordance with the solicitation criteria. (Contracting issue)

Protest against procuring agency’s use of non-cost factors to select private sector challenger in A-76 competition – denied. GAO stated that the protest was untimely on this issue, as the protestor had a duty to object to the solicitation provisions prior to the closing deadline for receipt of offers. (Legal/GAO Procedural issue)

Protest that procuring agency violated A-76 rules in not determining existing contract price unreasonable before proceeding with A-76 acquisition – denied. GAO stated that the protest was untimely on this issue, as the protestor had a duty to object to the issuance of the A-76 solicitation prior to the closing deadline for receipt of offers. (Legal/GAO Procedural issue)

Protest that procuring agency did not utilize best value trade off criteria in conducting the Government MP versus private sector firm cost comparison – denied. GAO found that protestor was not an interested party on this issue, as it was not the successful private sector offeror, and therefore was not permitted to file a protest on this basis. (Legal/GAO Procedural issue)

Overall outcome – protest denied (Government win.)

38. Rice Services, Ltd., B-284997, June 29, 2000

Protest that procuring agency failed to properly conduct technical balancing of the Government MP against the protestor’s technical proposal – sustained. GAO stated that the procuring agency noted many technical enhancements during its evaluation of the protestor’s proposal. However, when requested by the contracting officer to compare the levels of performance quality, the technical evaluation team stated that it found no

differences between the Government MP and the protestor's proposal. GAO found that the procuring agency's generic explanation in this regard was insufficient, given that the procurement record had documented many specific excesses in the protestor's offer. (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

39. Rice Services, Ltd., B-284997.5, March 12, 2002

(This protest concerns the same A-76 acquisition referenced in case Number 38 immediately above.)

Protest that procuring agency unreasonably canceled an A-76 solicitation – denied. GAO stated that the agency has broad discretion to determine its minimum needs, and reasonably canceled the solicitation when it discovered problems and inconsistencies in the document. (Contracting issue)

Overall outcome – protest denied (Government win.)

40. RTS Travel Service, B-283055, September 23, 1999

Protest that agency improperly determined that in-house performance was more economical under a direct conversion process (utilizing a market survey of existing contract prices in lieu of conducting a full A-76 cost study) – denied. GAO found that the procuring agency followed proper procedures in conducting the A-76 direct conversion process. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

41. Shaw Infrastructure, Inc., B-291121, November 19, 2002

Protest that procuring agency unreasonably denied protestor the opportunity to further revise its unacceptable proposal after discussions and final proposal revisions – denied. GAO stated that the procuring agency acted reasonably, and was not required to allow additional proposal corrections. (Contracting issue)

Overall outcome – protest denied (Government win.)

42. Sodexo Management, Inc., B-289605.2, July 5, 2002

Protest that the Government MP failed to meet numerous PWS requirements – denied. GAO found that the procuring agency properly evaluated the MP, and that there was no basis to conclude that the MP failed to meet the PWS. (A-76 Process issue)

Protest that the Government MP improperly used Government non-appropriated fund (NAFI) personnel for 80% of the MEO positions – sustained. GAO stated that because NAFI employees receive lower wages and fringe benefits than normal appropriated fund Government personnel, the procuring agency had a duty to disclose the MEO's use of NAFI employees to private sector offerors. Lack of such disclosure created an unfair competition. (A-76 Process issue)

Protest that procuring agency did not properly adjust the Government MP during the technical balancing phase – denied. GAO found that the procuring agency appropriately documented the differences between the MP and the protestor's proposal, and reasonably concluded that the differences did not constitute protestor improvements to performance or performance quality. (A-76 Process – Balancing issue)

Overall outcome – protest sustained (Government loss.)

43. Southwest Anesthesia Services, B-279176.2, July 21, 1998

Protest that the procuring agency's decision to cancel a non A-76 solicitation was unreasonable – denied. GAO found that the agency's decision to increase its in-house medical anesthesia staffing (and thus cancel the solicitation) was within its right to determine the agency's minimum needs. (Contracting issue)

Protest that the procuring agency should have conducted an A-76 competition prior to canceling a non-A-76 solicitation and securing services in-house – denied. GAO stated that it does not generally review agency decisions to cancel solicitations and perform work with in-house personnel. (Legal/GAO Procedural issue)

Overall outcome – protest denied (Government win.)

44. Symvionics, Inc., B-281199.2, March 4, 1999

Protest that agency failed to seal the Government MP in accordance with A-76 RSH guidelines – denied. GAO found that although the MP was mishandled and not placed in sealed envelope/container, it was otherwise properly completed, secured, and unaltered prior to the receipt and evaluation of protestor’s proposal. Therefore, the protestor was not prejudiced. (A-76 Process issue)

Protest that administrative appeal authority improperly allowed Government MEO to replace unallowable volunteer labor with proper appropriated fund personnel – denied. GAO stated that the procuring agency acted properly in allowing the MP correction, and appropriately calculated the amount of replacement labor necessary. (A-76 Process issue)

Overall outcome – protest denied (Government win.)

45. TDF Corporation, B-288392, B-288392.2, October 23, 2001

Protest that a conflict of interest was created by the presence on the technical evaluation team of two Government employees from the function undergoing A-76 study – denied. GAO noted that the two employees’ positions were designated as inherently governmental, and thus exempt from the study. GAO found no evidence that the procuring agency’s evaluation of the protestor’s proposal was improper, nor did GAO find any evidence that the protestor was prejudiced by any potential conflict of interest. (A-76 Process issue)

Protest that procuring agency improperly evaluated protestor’s staffing as unacceptable – denied. GAO stated that the procuring agency properly evaluated the protestor’s staffing. (Contracting issue)

Overall outcome – protest denied (Government win.)

46. Trajen, Inc., B-284310, B-284310.2, March 28, 2000

Protest that administrative appeal authority failed to recognize that Government MP could not meet some PWS requirements – sustained. GAO found that the administrative appeal authority did not recognize that MEO did not include personnel necessary to perform required painting tasks. (A-76 Process issue)

Protest that administrative appeal authority directed the use of an improper tax adjustment rate from the tax table in the A-76 RSH – sustained. GAO stated that the administrative appeal authority utilized a lower, incorrect tax rate. The failure to use the correct tax adjustment rate for miscellaneous services resulted in a smaller decrease to the protestor’s proposed price. (A-76 Process issue)

Protest that administrative appeal authority improperly calculated the one-time conversion cost adjustment (added to protestor’s cost as an A-76 adjustment, reflecting anticipated Government personnel relocation costs in the event of an A-76 contractor victory) – sustained. GAO found that the administrative appeal authority improperly overstated the one-time conversion cost by including the relocation cost of one military full-time equivalent (FTE), in addition to two civilian positions. The A-76 RSH does not permit military personnel relocation expenses to be included in one-time conversion costs. (A-76 Process issue)

Overall outcome – protest sustained (Government loss.)

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