



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



OFFICE OF THE ASSISTANT SECRETARY

24 APR 1995

ACQUISITION POLICY 95A-007

MEMORANDUM FOR DISTRIBUTION

FROM: SAF/AQ
1060 Air Force Pentagon
Washington, DC 20330-1060

SUBJECT: Reporting of Nunn-Warner Exempted Federal Information
Processing (FIP) Resource Acquisitions

The purpose of this memorandum is to issue new policy regarding the reporting of Nunn-Warner exempted FIP resource acquisitions. This policy applies to contracts awarded under the authority of the Nunn-Warner Amendment, by any Air Force contracting office. This policy is effective on the date of this memorandum. It supplements the policy issued by ASD (C3I), at attachment 4, and replaces the interim policy issued in paragraph 2 of SAF/AQK message 2316302 Jan 95 .

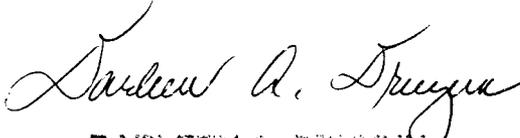
Recent General Services Board of Contract Appeals (GSBCA) decisions concerning the disposition of procurements, protested on the basis of Nunn-Warner exemptive authority, make the cost of an invalid determination excessively high. If a protest is sustained based on the argument that the procurement should have been made under the General Services Administration's (GSA's) specific delegation authority, all contracting actions to that point may be ruled void and the procurement may be required to begin anew.

Attachment 1 to this memorandum establishes new determination and reporting requirements. Attachments 2 and 3 should guide you in making and justifying a Nunn-Warner exemption determination. Attachment 4 is the ASD/C3I memorandum that initiated this policy. Attachment 5 provides an example of a thoroughly documented and justified Nunn-Warner determination.

As a matter of interest, obtaining a GSA Delegation of Procurement Authority (DPA) is neither difficult nor onerous. A GSA DPA, however, brings the contract award under the jurisdiction of the GSBCA for resolution of protest. On the other hand, an acquisition incorrectly determined to be Nunn-Warner exempt is still subject to the jurisdiction of the GSBCA with the added downside that, if the GSBCA determines that the procurement is not exempt, the acquisition must recommence with the issuance of a new Request for Proposal (RFP). If a procurement is determined by the Air Force to be exempt, the determination-approving official should be prepared to testify before the GSBCA if the contract or RFP is protested.

The best "bottom-line" advice I can give you is this. Nunn-Warner exemptions should be clearly justified. Failure to correctly exempt a FIP acquisition could result in starting over. If the exemption cannot be clearly justified, you should request a GSA delegation.

Point of contact for questions is Mr. Robert Olear, SAF/AQKC, 703-695-5556 or DSN 225-5556.


DARLEEN A. DRUYUN
Principal Deputy Assistant Secretary
(Acquisition & Management)

5 Attachments

1. Reporting Requirements
2. Guidelines for Nunn-Warner Exemption Determination
3. The Warner Amendment: A Tale of Gordian Knots and Daisy Chains
4. ASD (C3I) Memorandum, Jan 10, 1995
5. Justification Example

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**REPORTING REQUIREMENTS
FOR
NUNN-WARNER EXEMPT ACQUISITIONS**

1. The senior command requirements official (at a level not below general officer) shall determine whether to exempt a contract under one or more categories of the Nunn-Warner amendment. He/she shall report on **each** proposed contract to procure Federal Information Processing (FIP) resources, that meets both of the following criteria.

a. Total estimated cost or maximum order limitation greater than \$25 million (including all anticipated optional quantities, resources, and periods); or designated special interest.

b. Exempt from the provisions of the Brooks Act by one or more specific categories of the Nunn-Warner Amendment (10 U.S.C., 2315).

2. Submit reports, in Microsoft Word or Wordperfect, using one of the following modes (in order of preference). Report shall arrive in SAF/AQKC at least 50 days prior to release of solicitation.

a. Electronic.

(1) By e-mail attachment (address: rolear@aipo.hq.af.mil).

(2) By upload to SAF/AQKC Bulletin Board (703-697-0018, DSN 227-0018).

b. Hard copy, to SAF/AQKC, 1060 AF Pentagon, Washington DC 20330-1060.

c. Fax, to 703-614-4471, DSN 224-4471.

3. Document using the format specified in the attachment to ASD(C3I) memorandum (attached). In addition, in Section II.D, provide justification for **each** applicable exemption category.

4. Report shall include evidence of appropriate command legal review.

Guidelines for Nunn-Warner Exemption Determination

GSA's Federal Information Resources Management Regulation (FIRMR) **acquisition rules** apply to "any Federal agency solicitation or contract" that requires:

- Delivery of FIP resources for use by a federal agency or users designated by the agency.
- The performance of a service, or furnishing of a product, where the contractor must make significant use of FIP resources.

Exemptions to FIRMR (or Brooks Act) applicability include:

- Radar, sonar, radio and television equipment.
- Exemption under the Nunn-Warner amendment, for DoD, if the function, operation or use of the resources:
 - (1) Involves intelligence activities.
 - (2) Involves cryptologic activities related to national security.
 - (3) Involves command and control of military forces.
 - (4) Involves equipment which is an integral part of a weapon or weapon system.
 - (5) Is critical to the direct fulfillment of a military or intelligence mission (does **not** apply to use in administrative and business applications).

Suggestions for applying the exemptions:

Exemptions (1) and (2) are straightforward and do not require interpretation.

To qualify under exemption (3), the FIP resources must be dedicated to and directly involved in coordinating or controlling the actions or movements of warriors, or materiel needed by warriors to perform their mission.

To use exemption (4), base your decision on the specific weapon system supported and the proximity of the support system. If applicable, specifically state (and support) that the FIP resources:

- are dedicated to the system, or essential to it in real time.
- directly support specialized training or diagnostic testing.
- are used for research and development of the weapon system.

To use exemption (5), base your decision on the specific military or intelligence mission. The FIP resources to be acquired must be **critical** to the **direct fulfillment** of that mission, not just important. If in doubt, use the following definitions.

- Critical means "crucial or indispensable."
- Direct means "with nothing intervening."
- Fulfillment means "to carry out or accomplish."

The FIP resources are not to be used for routine administrative and business applications.

Recommended Statement:

To make the nature and purpose of your Nunn-Warner exemption absolutely clear, you should include the following statement in your determination:

“It is essential that this contract not be used for routine administrative and business applications such as payroll, finance, logistics and personnel management. Changes in the use of these resources requires prior approval from this office.”

Mixed Uses (both Brooks and Nunn-Warner):

If the information processing system in which the FIP resources will be installed will support **both** exempt and administrative or business applications (like finance, logistics, payroll, personnel, etc.), the procurement will be exempt if it can be demonstrated that the exempt uses are the primary purpose of the acquisition. Non-DoD use will not always deprive the procurement of its exempt status. Separating the two types of uses and users (exempt and non-exempt) is difficult. You should consult your legal advisor before making determinations when there is joint use. For contracts where either administrative or business applications are not incidental, you should treat the entire requirement as covered by the FIRMR.

Brooks Delegations:

SAF/AQK redelegated the ~~Air~~ Force's agency procurement authority in January 1995. Contract amounts above your specific command redelegation will require an Agency Procurement Request submission.

The Warner Amendment: A Tale Of Gordian Knots And Daisy Chains'

I. INTRODUCTION

This paper provides a review of the case law regarding the application of the Warner Amendment, which exempts certain procurements from the Brooks Act. ~~Part~~ I of the paper will provide a brief introduction of the background of the Brooks Act and the Warner Amendment. ~~Part~~ II of the paper will discuss why an examination of the Warner Amendment is timely. ~~Part~~ III of the paper will discuss the process for an agency to invoke the Warner Amendment. ~~Part~~ IV of the paper will discuss the five exemptions of the Warner Amendment. ~~Part~~ V of the paper will discuss the application of the Warner Amendment when the procurement involves exempt and non-exempt **ADPE**.

A. The Brooks Act

Until 1965, federal agencies purchased their automatic data processing equipment (**ADPE**)² without the assistance, or interference, from the General

¹ The term Gordian knot comes from the story about an intricate knot tied by King Gordius of Phrygia. Alexander the Great cut the knot with his sword after he heard an oracle promise that whoever could undo the knot would be the next ruler of Asia. A Gordian knot has come to mean an exceedingly complicated problem or deadlock. See The American Heritage Dictionary 568 (2d Ed. 1982). Senator Warner believed that the Warner Amendment was necessary to cut the Gordian knot created by GSA's oversight of DOD procurements. See 27 Cong. Rec. § 5047 (1981). quoted in, Pacificorp Cautital Inc., GSBCA 9231-P-R, 88-1 BCA ¶ 20,410, at 103,242, 1987BPD ¶ 278, at 4, denying recon., GSBCA 9231, 88-1 BCA 120,330, 1987 BPD 261, aff'd 852 F.2d 549 (Fed. Cir. 1988).

In its first case addressing the issue, the GSBCA used the term daisy chain in denying the application of the Warner Amendment. Julie Research Laboratories, Inc., GSBCA No. 8070-P, 85-3 BCA ¶ 16,295, at 91,810, 1985BPD ¶ 55, at 9. A daisy chain is a system of transmitting signals along a bus to several peripherals in a series so that it affects only the peripheral for which it is intended. Webster's Computer Dictionary 60 (1992).

² The Brooks Act uses **this** term, but its implementing regulations, the Federal Information Resources Management Regulations (**FIRMR**) use the term Federal information processing (FIP) resources. 40 U.S.C. § 759(a)(2) and 41 C.F.R. 201-1.000. **This** memorandum will use both terms interchangeably.

Services Administration (GSA). As a result of criticism³ that **this** decentralized approach was inefficient and duplicative, Congress enacted the Brooks Act in 1965.⁴ The Brooks Act makes the Administrator of GSA the sole authority to coordinate and provide for the economic and efficient purchase, lease, and maintenance of ADPE by federal agencies? As a result of the Competition in Contracting Act of 1984, the GSA board of Contract Appeals (GSBCA or board) has authority to review alleged violations of statute **or** regulation of contracting officers in procurements subject to the Brooks Act.⁶

B. The Warner Amendment

Amidst accusations that GSA participation in the Department of Defense's (DOD's) procurement of ADPE was harming national security, Congress passed the Warner Amendment as **part** of the DOD Authorization Act of 1982.⁷ Senator Warner, the chief sponsor of the Amendment, assumed the role of Alexander the Great against the Administrator of GSA as King Gordius of Phrygia. Senator Warner summarized the rationale for the Warner Amendment as follows:

[T]he committee has recommended that Congress
by adopting this legislation, cut a Gordian knot which is

³ See Report of Findings and Recommendations Resulting **from** the Automatic Data Processing (ADP) Responsibilities Study, Sep. 1958 to June 1959," Bureau of the Budget. Reprinted in hearings on H.R. 4845, 89th Cong. 1st Sess. Discussed in Streamlining Defense Acquisition Laws, at 3-220; see also S. Rep. No. 938, 89th Cong., 1st Sess. 2 (1965).

⁴ Pub. L. No. 89-306, 79 Stat. 1127 (1965).

⁵ 40 U.S.C. § 759(a)(1).

⁶ Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2713.98 **Stat.** 494, 1184 (1984), codified at 40 U.S.C. § 759(f). See Tolle, "A Review of the First Year of ADP Bid Protests at the GSBCA," 16 Public Contract L.J. 120 (1986) (provides well written general history of first year and discusses resolution of first Warner Amendment case).

⁷ Pub. L. 97-86, 95 Stat. 1117 (1981). codified at 10 **U.S.C.** § 2315 and 40 U.S.C. § 759(a)(3)(C).

strangling agencies charged with performing critical national security missions.

The Gordian knot referred to is the body of regulation applying to ADP procurements by the Federal Government which has evolved since the passage in 1965 of Public Law 89-306, commonly known as the Brooks Act.

127 Cong. Rec. § 5047 (1981), quoted in, Pacificorp Capital Inc., GSBCA 9231-P-R, 88-1 BCA ¶ 20,410, at 103,242, 1987 BPD ¶ 278, at 4, denying recon., GSBCA 9231, 88-1 BCA ¶ 20,330, 1987 BPD 261, aff'd 852 F.2d 549 (Fed. Cir. 1988).

II. THE CURRENT IMPORTANCE OF THE WARNER AMENDMENT

An examination of the Warner Amendment is ripe for review because of a recent case decided by the United States Court of Appeals for the Federal Circuit, which reversed GSBCA precedent. In CACI, Inc. v. Stone, Secretary of the Army, 990 F.2d 1233 (1993), the court held that a procurement that is subject to the Brooks Act, but conducted without a delegation of procurement authority, **is** void. Before CACI, if the board found that **an** agency had failed to obtain a delegation of procurement authority, the board would grant the protest, but permit the agency to obtain a delegation of procurement authority and continue the procurement. The only remedy for the protester was its cost for pursuing the bid protest; thus, **an** agency's failure to obtain a delegation of procurement authority imposed no real harm to the government or the awardee.

The ramifications of CACI are uncertain and potentially devastating.’ In the worst case scenario, the agency must begin the procurement anew, from the initial synopsis. The board has already stated that it lacks authority to ratify the award of a contract where an agency failed to get a delegation of procurement authority. Science Applications Intl. Corp. v. National Aeronautics & Space Administration, GSBICA 12600-P, 12616-P, 94-1 BCA 926,553, at 132,141-42, 1993 BPD ¶ 328, at 21-22 (board left unresolved whether GSA could ratify award). Such a result would seriously harm the government and the contractors who participated in the procurement. That result could especially **harm** the awardee because it might have incurred costs in performing the contract that would not be recoverable as the contract is void. At best, the contractor can hope to recover under a quantum merit basis, but this will take additional time and resources.⁹

Whatever the collateral damage caused by a “CACI” violation, its potential effect should cause the government to closely review its basis for not obtaining a delegation of procurement authority. Thus, when invoking the Warner Amendment, the government should be mindful of the lessons demonstrated by the cases discussed below.

III. PROCEDURES

To invoke the Warner Amendment, **an** agency must make a formal finding that it applies to the procurement before issuing a solicitation. See 48 C.F.R. 239.001-70(c). Such a determination, however, is not necessary for the board to find that the Warner Amendment applies. Cyberchron Corp., 867 F.2d 1407,1409

^a See John S. Pather and Jonathan D. Shaffer, “The CACI Decision—The Risk that Lack of a Delegation of Procurement Authority Voids the Contract,” 61 Federal Contracts Report 514 (April 18,1994).

⁹ See John S. Pather and Jonathan D. Shaffer, “The CACI Decision--The Risk that Lack of a Delegation of Procurement Authority Voids the Contract,” 61 Federal Contracts Report 514, at 520-21 (April 18, 1994)

(Fed. Cir. 1989), affg. GSBICA 9445-P, 88-2 BCA ¶ 20,783, 1988 BPD ¶ 90. In this case, the court, affirming the GSBICA, held that nothing in the language of the Warner Amendment imposes, or even suggests, that the DOD must first determine whether the Warner Amendment applies. Id.¹⁰ Nevertheless, the board is more likely to find the Warner Amendment applicable if the agency made a well reasoned, prior determination. See Automated Data Management, Inc., GSBICA No. 9486-P, 88-3 BCA ¶ 20,848, at 105,441, 1988 BPD ¶ 118, at 6 (Agency determination that Warner Amendment applied aided in compilation of record and assisted board in reaching its decision.).

Generally, if the Warner Amendment is applicable, an agency can get the board to dismiss the case before a hearing on the merits. Agency counsel can file a pre-hearing motion to dismiss for lack of jurisdiction based on application of the Warner Amendment. The motion must include documentation supporting invocation of at least one of the Warner Amendment exemptions, including affidavits from the highest level person available. In some cases, the board will rule on the motion after a written response by protester. The board may permit limited discovery, including oral depositions, before the protester must respond. Sometimes, the Board will rule on the motion after a limited hearing on the jurisdictional issue, where protester will have the opportunity to cross examine agency personnel. In a few instances, the board will not rule on the motion until after full discovery and a hearing on the merits, which usually occurs between **20** and **25** working days after the contractor filed its protest. See e.g., Management Systems Designers, Inc., GSBICA No. 9207-P, 88-1 BCA ¶ 20,404, 1987 BPD ¶ 286 (after a hearing on the merits, board dismissed case for lack of jurisdiction).

¹⁰ But see Management Systems Designers, Inc., GSBICA No. 9207-P, 88-1 BCA ¶ 20,404, at 103,216, 1987 BPD ¶ 286, at 13 (one judge in dissent said that the board could not address the Warner Amendment issue because the agency had failed to make a formal determination that the Warner Amendment applied.) (the board decided this case before the Federal Circuit's decision in Cyberchron Corp.).

IV. THE WARNER AMENDMENT'S FIVE EXEMPTIONS

The Warner Amendment excludes five categories of ADPE procurements from the **Brooks Act**:

This section ["The Brooks Act," 40 U.S.C. § 759] does not apply to --

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

(i) involves intelligence activities;

(ii) involves cryptologic activities related to national security;

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

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

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

40 U.S.C. § 759 (a)(3)(C). The remainder of this paper will discuss each of these exemptions in the order of their prevalence and importance before the board. While there are some general rules that one can obtain from these cases, one must be mindful that the board will decide each case on the facts presented before it; thus, success in a prior case, does not ensure success in a future case.

A. Critical to the Direct Fulfillment of Military or Intelligence Missions

The most litigated exemption of the Warner Amendment is exemption (v), procurements that are critical to the direct fulfillment of military or intelligence missions, or mission critical for short. Other than situations involving exemption (iv), the board is most likely to disagree with an agency's determination regarding exemption (v).¹¹ Exemption (v) is a broad, catch-all type exemption that usually encompasses the other narrower exemptions.

1. Historical perspective: the rise and fall of the daisy chain

Appropriately, the first GSBCA case involving the Warner Amendment addressed exemption (v) and began the daisy chain. In Julie Research Laboratories, GSBCA No. 8070-P, 85-3 BCA ¶ 16,295, 1985 BPD ¶ 55, the protest challenged the Navy's purchase of computer equipment for a calibration laboratory. The laboratory calibrated test equipment, known as Modularity Equipped and Configured Calibrators and Analyzers (MECCA). MECCA supported the Trident missile weapon system. The Navy moved to dismiss the protest for lack of jurisdiction based on exemption (iv), integral part of a weapon system, and exemption (v), mission critical.¹² The board denied the motion to dismiss, declining to find either exemption applicable. Id. at 91,806-07, 91,810, 1985 BPD ¶ 55, at 2, 9.

¹¹ Of the nineteen cases regarding the mission critical exemption, the GSBCA has found the exemption applicable 11 times, or 58%. The GSBCA is least likely to find exemption (iv), integral part of weapon system, applicable. The GSBCA has found exemption (iv) applicable only 2 times out of 7, or 29%. For exemption (i), intelligence activities, of 7 cases, the GSBCA has found the exemption applicable 6 times, or 86%. For exemption (ii), cryptologic activities, of 2 cases, the GSBCA has found the exemption applicable 2 times, or 100%. For exemption (iii), command and control, of the 8 cases, the GSBCA has found the exemption applicable 6 times, or 75%.

¹²

See page 18 for a discussion of this case and exemption (iv).

As to exemption (v), the board established a proximity test to determine whether a procurement was "critical to the direct fulfillment of military or intelligence missions," focusing on physical directness. The board implicitly recognized that the support and maintenance of a weapon system was a legitimate military mission, but found that the relationship between the procurement and the mission was not direct enough to justify application of the exemption. Implicitly, the board concluded that a procurement two "daisy chains" away from the mission was not critical and direct: "In this case, it is the equipment calibrated and tested by the MECCA system that directly supports the items used to maintain the Trident weapons system. If this is direct support equipment, then it may be properly said that every piece of equipment that the Department of Defense acquires is direct support equipment. There is a limit to the length of the daisy chain." *Id.* at 91,810, 1985 BPD ¶ 55, at 9.

While the board's view of the daisy chain has changed over the years, the daisy chain's length must still be very short for successful invocation of exemption (v). Thus, the Administrator of GSA, as King Gordius of Phrygia, still holds the throne, and the GSBCA will closely scrutinize any invocation of exemption (v). The remainder of this **part** discusses the current requirements to justify exemption (v).

2. Three requirements for exemption (v)

There are three requirements for exemption (v): First, the procurement must involve a military or intelligence mission. Second, the contract must be critical to the mission's direct fulfillment. Third, an agency must not use the computers for routine administrative tasks. See e.g., *Information Systems & Networks Corp. v. United States (ISN)*, 946 F.2d 876,878 (Fed. Cir. 1991), *aff'd*, GSBCA No. 10775-

P, 91-1 BCA ¶ 23,354, 1990 BPD ¶ 296.¹³ While there are three requirements, the most challenged requirement is the second. Thus, only a brief discussion of the first and third requirements is below.

a military or intelligence mission

The most basic requirement for application of exemption (v) is that the agency identify **a** military or intelligence mission. While the board has permitted **all** types of missions, “[p]rotecting American lives, property, and interests against hostile attack is the quintessential military mission.” Information Systems & Networks Corp. v. United States, 946 F.2d 876,878 (Fed. Cir. 1991), aff’d, GSBICA No. 10775-P, 91-1 BCA ¶ 23,354, 1990 BPD 1296. The failure to identify a mission is fatal to invocation of the exemption. In Cyberchron Corp., GSBICA 10263-P, 90-1 BCA ¶ 22,397, at 112,530,112,531,1989 BPD ¶ 308, at 1-2, 4, a procurement for simulators used to test command, control, communications and intelligence systems, the board found exemption (v) inapplicable because the intervenor (the agency relied on exemption (iii)) had not identified a specific military mission.¹⁴

b. not used for routine administrative tasks

The third requirement for exemption (v) is that the agency not use the ADPE for routine administrative tasks. Routine administrative tasks include administrative and business applications such as payroll, finance, logistics, and personnel management. 40 U.S.C. § 759(a)(3)(C)(v); see also 48 C.F.R. 239.001-70(a)(5) and 41 C.F.R. 201-1.002-2(a)(2)(ii). An agency must provide a detailed factual

¹³ The contracting method that the agency uses is irrelevant to the application of the Warner Amendment. Intemated Systems Group, Inc. v. Department of the Air Force, GSBICA 11955-P, 93-1 BCA ¶ 25,340,1992 BPD ¶ 216 (board found exemptions (i) and (v) applicable based on classified affidavit and rejected protester’s argument that Warner Amendment inapplicable if agency using GSA schedule contract).

¹⁴ See infra page 22 for discussion of this case and exemption (iii).

statement explaining the use of the ADPE, demonstrating that an agency will not use the ADPE for these routine administrative tasks. In Tetra Industries, Inc., GSBCA No. 9243-P, 88-1 BCA ¶ 20,301, at 102,686, 1987 BPD ¶ 245, at 3, the board denied application of the mission critical exemption because the Army provided inadequate detail to support a finding that it would not use, even in part, the system for routine applications. The Army simply provided an affidavit saying that it would not use the ADPE for routine applications.¹⁵

c. critical to the mission’s direct fulfillment: a real and convincing nexus

The most challenged requirement of exemption (v) is whether the ADPE being procured is critical to the mission’s direct fulfillment. As discussed above, the board initially applied a very physical test to make **this** determination, as demonstrated in Julie Research Laboratories. The board’s current treatment of **this** requirement has evolved to a more subtle metaphysical requirement. The board has evolved by looking to the common meaning of the words used in the exemption. See e.g., Pacificorp Capital Inc., 852 F.2d 549,551 (Fed. Cir. 1988), aff’g, GSBCA 9231-P, 88-1 BCA ¶ 20,330, 1987 BPD 261, recon. denied, GSBCA 9231-P-R, 88-1 BCA ¶ 20,410, 1987 BPD ¶ 278. The court now interprets critical to mean “crucial” or “indispensable,” direct to mean “proceeding from one point to another . . . without deviation or interruption,” and fulfillment to mean “to carry out” or “accomplish.” Id., (quoting Webster’s **Third** New International Dictionary 538, 640, and 918 (1976)). Based on these common meanings, in Pacificorp, the court concluded that “the GSBCA has no bid protest jurisdiction over DOD procurements of ADPE that are crucial to accomplishing a military mission if the ADPE is not compromised by routine administrative tasks.” Id. The court agreed with the

¹⁵ See infra page 26 for discussion of **this** case and exemption (iv).

GSBCA's conclusion that exemption (v) was applicable because the Air Force had procured an upgrade to a central processing unit that directly supported several weapons systems by debugging, modifying, and enhancing embedded software. Id. at 551; see also GSBCA 9231-P, 88-1 BCA ¶ 20,330, at 102,771-73.¹⁶

Refining this guidance, the board will find exemption (v) applicable if there is a real and convincing nexus between the procurement and the fulfillment of the mission. Data General Service, Inc., GSBCA Nos. 9724-P, 9727-P, 89-1 BCA ¶ 21,355, at 107,655, 1988 BPD ¶ 274, at 6. In Data General Service, the board recognized that the analysis for exemption (v) was more metaphysical than physical. The board "rewrote" its history and said that the daisy chain metaphor from Julie Research Laboratories was applicable to the analysis of exemption (iv), but not to exemption (v).¹⁷ Applying this metaphysical real and convincing nexus test, the board found exemption (v) applicable.

In Data General Service, Inc., the Defense Mapping Agency, an organizational component of the Department of Defense, was procuring hardware and software maintenance for three systems. The systems served several purposes relating to military and intelligence missions: one system helped produced **digital** productions of the features of the earth that the government used in the guidance system for Pershing II missiles, for mission planning of cruise missiles, and for pilot training. Id. at 107,653, 1988 BPD ¶ 274, at 2. Another system produced information about airfields, runways, and related facilities, and the government used it to prepare for flights and target information. Id., 1988 BPD ¶ 274, at 3. The **third** system produced information used to assist long range navigation of the Navy's

¹⁶ See infra page 20 for discussion of this case and exemption (iv).

¹⁷ While reaching the correct result in Data General Service Inc., its recitation of the history of the "daisy chain" was invalid; in Julie Research, the Board had applied the "daisy chain" test to exemption (v). Applying the daisy chain to exemption (iv), but not (v), however is the better approach because the physical requirement of the daisy chain is more appropriate for exemption (iv) cases than for exemption (v) cases.

submarine program. The Navy did not use the systems for routine purposes. Id. at 107,653-54, 1988BPD ¶ 274, at 4. Based on this information, the board determined that the three systems that the agency was maintaining with the ADPE through this contract were undoubtedly critical to the direct fulfillment of military or intelligence missions. Id. at 107,654, 1988 BPD §274, at 6.

A real and convincing nexus is sure to exist if the ADPE directly supports a weapon system, especially if part of the ADPE is embedded in the weapon system. The board illustrated this point in Electronic Systems Associates, Inc. (ESA), 895 F.2d 1398, 1402 (Fed. Cir. 1990), aff'g, GSBCA No. 9966-P, 89-2 BCA ¶ 21,759, 1989 BPD ¶ 107.¹⁸ In ESA, the board's appellate authority, the United States Court of Appeals for the Federal Circuit, agreed with the board that exemptions (iv)¹⁹ and (v) were applicable." The Air Force was procuring a reduced instruction set computer ADA environment. The Air Force intended to use this computer environment for the development of real-time, embedded software for the radiation hardened 32-bit (RH-32) computer. The Air Force intended to use the RH-32 computer in several weapons systems that were part of the strategic defense initiative program. The court and board agreed, comparing the case to Pacificom, that this ADPE was mission critical because the agency would use it to develop software that it would embed in weapons systems, and the agency would not use it

¹⁸ See also Cyberchron Corp., GSBCA 9445-P, 88-2 BCA ¶ 20,783, 1988 BPD ¶ 90, aff'd, 867 F.2d 1407 (Fed. Cir. 1989) (Navy contract for ruggedized automatic data processing equipment, combat support disks, that were to be part of tactical military weapons systems, meets requirements for exemption (v), and all exemptions).

¹⁹ See infra page 18 for discussion of ESA and exemption (iv).

²⁰ The court used the real and convincing nexus test and said that its decision was consistent with four board cases applying exemption (v), citing Data General Service, Inc., GSBCA 9724-P, 89-1 BCA ¶ 21,355, 1988 BPD ¶ 274; Rocky Mountain Trading Company, Systems Division, GSBCA No. 9815-P, 89-1 BCA ¶ 21,450, 1988 BPD ¶ 322; Automated Data Management, Inc., GSBCA No. 9486-P, 88-3 BCA ¶ 20,848, 1988 BPD ¶ 118; and Management Systems Designers, Inc., GSBCA No. 9207-P, 88-1 BCA ¶ 20,404, 1987 BPD ¶ 286.

for routine applications. Id. at 1402; see also 89-2 BCA ¶ 21,759, at 109,505, 1989 BPD ¶ 107, at 7.

The Board has allowed **an** agency to invoke the mission critical exemption even though the relationship between the ADPE and the weapons system was less direct than the relationship in ESA. In Rocky Mountain Trading Company, Systems Division, GSBCA No. 9815-P, 89-1 BCA ¶ 21,450, 1988 BPD ¶ 322, the board found exemption (v) applicable where ADPE supported a “command center” that supported a weapon system. This case involved a contract for computers, which were spare and repair parts, for the Navy’s Tomahawk Command and Control Subsystems (TCCSs). The TCCSs supported the operational readiness of Theater Mission Planning Centers (TMPCs), which in turn controlled the deployment of the cruise missiles. Id. at 108,092, 1988 BPD ¶ 322, at 1. Despite this somewhat attenuated relationship, the Board held that a direct and necessary relationship between the procurement and cruise missile system was beyond cavil. Id. at 108,094, 1988 BPD ¶ 322, at 4.

Not all support of a weapon system guarantees application of exemption (v). The support must be direct or critical, not just important. For instance, ADPE used to train personnel who will be using a weapon system does not provide a real and convincing nexus to the fulfillment of a **military** mission. In Communications Technology Applications, Inc., GSBCA 9978-P, 89-3 BCA 21,941, 1989 BPD ¶ 164, the agency was buying computers as part of a training program for pilots of the F-14D aircraft, which was still in production. The F-14D’s primary mission was to be fleet defense. The board defined the necessary nexus to be that the **ADPE** must be “directly required for the performance of a military mission”. The board reasoned that while the training was very important to the mission, the ADPE only performs a helpful role in accomplishing that mission. Id. at 110,357, 1989 BPD ¶ 164, at 4. Thus, the board concluded that the nexus between the mission and the

ADPE was too remote and attenuated for exemption (v) to apply. *Id.*, 1989 BPD ¶ 164, at 4.²¹

The board will always find a real and convincing nexus exists when the agency cannot accomplish the military mission without the ADPE. The board, in essence, applies a but for test: but for the ADPE the agency cannot accomplish the mission. In Information Systems & Networks Corp. v. United States, 946 F.2d 876 (Fed. Cir. 1991), aff'g, GSBCA No. 10775-P, 91-1 BCA 123,354, 1990 BPD ¶ 296, the Navy had procured intrusion detection devices, which met the definition of ADPE, to prevent terrorist attacks at several high risk Naval installations. These devices were necessary to prevent terrorists from attacking these installations; **thus**, the court held that exemption (v) was applicable because the agency could not accomplish the mission without the devices. *Id.* at 878-79.

If the ADPE is crucial to accomplishing the mission, the board will generally find that a real and convincing nexus exists. ADPE services for the design and development of a system with a military mission fulfill the real and convincing nexus test. In Computer Sciences Corp., GSBCA 10388-P, 90-1 BCA ¶ 22,538, 1989 BPD ¶ 377, the agency was buying systems engineering and technical assistance (SETA) services for the design and development of specifications and performance requirements for systems that were integral to the nation's intelligence activities and the command and control of military forces. Because these services were crucial to these systems, the board found exemptions (i), (iii), and (v) applicable.

²¹

One judge, out of the three judge panel, however, disagreed and would have found exemption (v) applicable. *Id.* at 110, 357-60, 1989 BPD ¶ 164, at 4-7. The dissent demonstrates how the board could give independent application to exemptions (iv) and (v). While the relationship between the ADPE and the aircraft might not be integral, as is required by exemption (iv), one could view it as critical to the aircraft. The dissent reasoned that you cannot operate the aircraft unless you are trained, and the ADPE was critical to the training program. In discussing that exemption he stated that the board "should look to the criticality of the procurement as a whole rather than just the role of the ADPE plays in fulfilling the training mission." *Id.* at 110, 360, 1989 BPD ¶ 164, at 7. See infra page 19 for discussion of this case exemption (iv)

ADPE services that enable a system to perform its **military** mission fulfill the real and convincing nexus test. In Lockheed/MDB v. Department of the Navy, GSBCA 12097-P, 93-2 BCA ¶ 25,589, 1992 BPD ¶ 348, the board found exemptions (iii) and (v) applicable. This case involved a procurement for disk storage systems to support a system whose purpose was to exchange information among aircraft and ships to allow forces to participate in anti-submarine warfare, anti-surface warfare, over-the-horizon detection, law enforcement assistance, search and rescue, ocean surveillance, mining, and special operations. The board easily determined that the ADPE had a real and convincing nexus to a military mission, the detection and subsequent destruction of hostile submarines, because the ADPE enabled the system to perform. Id. at 127,417, 1992 BPD ¶ 348, at 3-4.

ADPE that supports the ordinary maintenance of systems with a military mission is not critical enough to present a real and convincing nexus. In AMTEC Information Services, Inc., GSBCA No. 8465-P, 86-3 BCA ¶ 19,020, 1986 BPD ¶ 86, vacated on other grounds, 86-3 BCA ¶ 19,021, 1986 BPD ¶ 102, the board rejected the application of exemption (v) in a procurement for computer-controlled camera-ready documentation for the Planned Maintenance System (PMS). The PMS supported equipment that the agency used on surface ships, submarines, and shore activities. The agency used this documentation to plan, schedule, and perform all maintenance requirements on its equipment, some of which were in weapon systems. Id. at 96,062, 1986 BPD ¶ 86, at 10. Along with the camera-ready documentation that the computer generated, the Navy required the contractor to provide a duplicate copy of the master data on-line. Id. at 96,058, 1986 BPD ¶ 86, at 2.

The board rejected application of exemption (v) because the ADPE being provided was not sufficiently critical to the stated mission. “Clearly, this procurement is important to the Navy’s mission and is related to the maintenance of

weapon systems, however, we **think** the Warner Amendment does not exempt everything that is related to the preparation and maintenance of weapons or to the fulfillment of military missions.” Id. at 96,064, 1986 BPD ¶ 86, at 14. The board reasoned that the procurement was not critical because of the amount of time the Government permitted for the contractor to complete the services. Id. at 96,065, 1986 BPD ¶ 86, at 15. In priority situations, the contractor had five working days and twelve working days in routine situations to provide these services. Id. at 96,063, 1986 BPD ¶ 86, at 11. The contractor had to provide on-line access only during business hours on workdays, and, in urgent circumstances, there were other lines of communication to obtain the same information. Thus, the board reasoned that the ADPE was important, “as are many logistics systems, but not critical to the direct fulfillment of the mission.” Id. at 96,065, 1986 BPD ¶ 86, at 15; see also Systems Management Am. Corp., GSBCA No. 9773-P, 89-1 BCA ¶ 107,660, 1988 BPD ¶ 279, motion for clarification denied, No. 9773-P-R, 1988 BPD ¶ 283 (computer system that supported maintenance of Navy ships and submarines, while important, not critical; thus exemption (v) inapplicable).

It is difficult to find a common theme to reconcile all the board’s exemption (v) cases. The board has drawn a fine line between procurements that are critical to a military mission, and thus exempt, and procurements that are merely important to a military mission, and thus not exempt. Important or critical does not depend on the type of ADPE. ADPE as simple as an ordinary printer can be critical to the fulfillment of a military mission. In RMTC Systems, Inc. v. Department of the Air Force, GSBCA 12167-P, 93-2 BCA ¶ 25,636, 1992 BPD ¶ 384, the Board rejected exemption (iv), but found exemption (v) applicable. In this case, the Air Force was buying printers for the Communications System Segment (CSS) of the Cheyenne Mountain Complex (CMC). Id. at 127,582, 1992 BPD ¶ 384, at 1. The CMC supported the primary mission of early warning and tracking of potential threats to

North America. The printers supported this mission by providing hard copies of messages, reports, and alarm detections. Id. at 127,583, 1992 BPD ¶ 384, at 2-3. The board found that the printers were critical to fulfilling a military mission. Id. at 127,584, 1992 BPD ¶ 384, at 4.

B. Involves Equipment Which is an Integral Part Of A Weapon System

Exemption (iv) exempts acquisitions for ADPE if the function, operation, or use of such resources involves equipment that is **an** integral part of a weapon system. The board has only found this exemption applicable two times. In each of these cases, because of the board's strict, bright-line interpretation of integral, as discussed below, the board easily decided that exemption (iv) was applicable.

It is axiomatic that the agency identifies the weapon system for this exemption to apply. RMTC Svstems. Inc. v. Department of the Air Force, GSBCA 12167-P, 93-2 BCA ¶ 25,636, at 127,584, 1992 BPD ¶ 384, at 4 (the board rejected application of exemption (iv), but found exemption (v) applicable, because Air Force did not identify weapon system). Once the agency identifies the weapon system, the agency must establish that the ADPE is integral to the system. In analyzing exemption (iv), the board applies a strict, bright-line interpretation of integral. This interpretation has written out exemption (iv) because if a procurement can meet this interpretation, then it can also meet the requirements for exemption (v). More often, however, a procurement fails to meet the requirements of (iv), but may meet the requirements for (v). See e.g. Id. and Pacificorp Capital Inc., 852 F.2d 549,551 (Fed. Cir. 1988), aff'g, GSBCA 9231-P, 88-1 BCA ¶ 20,330, 1987 BPD 261, recon. denied, GSBCA 9231-P-R, 88-1 BCA ¶ 20,410, 1987 BPD ¶ 278.

To meet the "integral" requirement, the board has required the ADPE to be embedded in the weapon system. If the ADPE is more than one "daisy chain" away

from the weapon system, exemption (iv) is inapplicable. In Julie Research, GSBCA No. 8070-P, 85-3 BCA ¶ 16,295, 1985 BPD ¶ 55, the originator of the daisy chain, the protest challenged the Navy's purchase of computer equipment for a calibration laboratory. The laboratory calibrated test equipment, known as Modularity Equipped and Configured Calibrators and Analyzers (MECCA). MECCA supported the Trident missile weapon system. As to exemption (iv), the board reasoned that while the test equipment, which the procured ADPE supported, was attached to the weapon system, the procured equipment was not. Exemption (iv) did not apply because the procured equipment was two "daisy chains" from the weapon system. Sarcastically, the board commented, "[t]his equipment is an integral part of a weapons system only in the sense that it is lightweight and portable, and perhaps could be easily thrown at the enemy." Id. at 91,810, 1985 BPD ¶ 55, at 9.

The board permits application of exemption (iv) only if the ADPE being procured will be embedded in the weapon system. In Electronic Systems Associates, Inc., GSBCA No. 9966-P, 89-2 BCA 121,759, 1989 BPD ¶ 107, aff'd, 895 F.2d. 1398 (Fed. Cir. 1990), the Air Force procured a reduced instruction set computer ADA environment (RISCAE) for the development of real-time embedded software for the radiation hardened 32-bit (RH-32) computer. The Air Force intended to use the RH-32 computer to handle the data processing requirements of several weapon systems that were part of the strategic defense initiative (SDI) program. The RISCAE procurement will develop a program that will be a part of any embedded software in a weapon system using the RH-32 computer. Id. at 109,502-03, 1989 BPD ¶ 107, at 1-2. While the case concentrated on exemption (v), the board agreed that the ADPE was an integral part of weapon system because the agency would use it to develop software that it would include in the RH-32 computers that it would embed in the weapon systems. The board and court

rejected the protester’s argument that exemption did not apply because the Anti Ballistic Missile treaty somehow prohibited development of weapons system for SDI. *Id.* at 109,505, 1989 BPD ¶ 107, at 6-7, *aff’d*, 895 F.2d. 1398, at 1402.²²

While the board has implied that exemption (iv) could be applicable absent embedment, no case has found exemption (iv) in such a situation. *See e.g.*, Communications Technology Applications, Inc., GSBCA 9978-P, 89-3 BCA ¶ 21,941, at 110,356, 1989 BPD ¶ 164, at 3 (in procurement for ADPE to support training program for aircraft, board found exemption (iv) inapplicable, holding that “[a]lthough the training lessons will help familiarize the trainees with features, functions, and operations of the aircraft, successful completion of a training course does not affect the functioning of the aircraft itself. The training is not directly or *indirectly* connected to the weapon and weapon systems.”)(emphasis added).

The board should permit **an** indirect connection to satisfy the Warner Amendment’s integral requirement. This more liberal interpretation would be more consistent with the common meaning of “integral,” which the court has directed the board to use.²³ *See e.g.*, Pacificom Capital Inc., 852 F.2d 549, at 551 (Fed. Cir. 1988), *aff’g*, GSBCA 9231-P, 88-1 BCA ¶ 20,330, 1987 BPD 261, *recon*, GSBCA 9231-P-R, 88-1 BCA ¶ 20,410, 1987 BPD ¶ 278 (court said use common meaning of language in Warner Amendment). The primary meaning for integral when used as **an** adjective, as it is used in the Warner Amendment, is “essential or necessary for completeness”. The American Heritage Dictionary 667 (2d Ed. 1982).²⁴ Using

²² In the **only** other case to find exemption (iv) applicable, the board found all the exemptions applied and rejected protester’s argument that the commerciality of the equipment precluded application of Warner Amendment. Cyberchron Corp., GSBCA 9445-P, 88-2 BCA ¶ 20,783, at 105,004, 1988 BPD ¶ 90, at 4, *aff’d*, 867 F.2d. 1407 (Fed. Cir. 1989) (Navy procured ruggedized computer, combat support disks that were to be part of tactical weapons systems).

²³ This more liberal interpretation would **also** be more consistent with the FIRMR. The FIRMR already contains **an** exception to the Brooks Act for embedded **FIP** equipment. 41 C.F.R. § 201-1.002(e).

²⁴ The Board might base its strict construction on the meaning of integral when used **as** a noun, which is “a complete unit.” *Id.*

this definition, the board should have found exemption (iv) applicable in Pacificom Capital Inc.

In Pacificorp Capital Inc., the Air Force bought a central processing unit (CPU) to support embedded computer software of several weapon systems. The CPU would debug, modify, and enhance the software, and the agency would use it in flight simulations to test the software. The board stated that this embedded software was integral and essential to these weapon systems. GSBCA 9231-P, 88-1 BCA ¶ 20,330, at 102,772, 1987 BPD ¶ 261, at 3. Accordingly, the board found that there was a direct link between the ADPE and the weapon system. Id. at 102,773, 1987 BPD ¶ 261, at 6. Despite this direct link, the board denied application of exemption (iv).

The board denied application of exemption (iv) because the agency relied on a Defense Federal Acquisition Regulation Supplement (DFARS) provision defining an integral part of a weapon system that the board held exceeded the plain meaning of the statute. Id. at 102,774, 1987 BPD ¶ 261, at 6.

The DFARS provided three illustrations of integral to a weapons system:

- (1) Physically a part of, dedicated to, or essential in real time to, performance of the mission of weapon systems;
- (2) Used for specialized training, diagnostic testing and maintenance, simulation, or calibration of weapons systems;
- (3) Used for research and development of weapons systems.

48 C.F.R. § 270.400(d). The board held that this regulation did not adequately reflect the intent of the Warner Amendment. The board stated that the language "used for diagnostic testing and maintenance or used for simulation of these systems" was unduly expansive and exceeded the plain meaning of the statute for

the phrase "integral part of a weapon or weapons system. The board also noted that the Warner Amendment does not give DOD authority to issue regulations to define the scope of the amendment. GSBCA 9231-P, 88-1 BCA ¶ 20,330, at 102,774, 1987 BPD ¶ 261, at 6.²⁵

The Board denied application of exemption (iv) without any explanation other than the invalidity of the DFARS provision. If the board had ruled upon the facts presented and applied the common meaning of integral, i.e., necessary or essential, then it should have determined that exemption (iv) was applicable. It is reasonable to conclude that a computer that directly supports an embedded part of weapon systems, should be found to be at least indirectly connected to the weapon system and therefore integral to the weapon system.

C. Involves the Command and Control of Military Forces

In applying exemption (iii), procurements that involve the command and control of military forces, the board has effectively eliminated any separate meaning between exemptions (iii) and (v). There is not one case in which the board found exemption (iii) applicable without also finding exemption (v) applicable.²⁶

To invoke exemption (iii), the agency must procure automated systems to move troops where the agency needs them to fulfill military missions.

Lockheed/MDB v. Department of the Navy, GSBCA 12097-P, 93-2 BCA ¶ 25,589, at 127,417, 1992 BPD ¶ 348, at 4. In Lockheed, the board found exemption (iii)

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In AMTEC Information Services, Inc., GSBCA No. 8465-P, 86-3 BCA ¶ 19,020, 1986 BPD ¶ 86, vacated on other grounds, 86-3 BCA ¶ 19,021, 1986 BPD ¶ 102, motion for reconsideration denied, 86-3 BCA ¶ 19,270, the Board had applied the DFARS provision that it found invalid in Pacificorp. In this case, the Navy procured computer-controlled photo-composed camera-ready documentation for the Planned Maintenance System (PMS) to support Weapons, Electronics, Marine and ~~Air~~ System equipment used on surface ships, submarines, and shore activities; the board denied application of exemption (iv) because the agency did not directly use the ADPE to diagnose and maintain the weapon systems. Id. at 96,065, 1986 BPD ¶ 86, at 14.

²⁶

See e.g., Wiltel, Inc. v. Defense Information Systems Agency, GSBCA 12310-P, 93-3 BCA ¶ 25,982, 1993 BPD ¶ 106 (record supported exemptions (i), (ii), (iii), and (v)); Cyberchron Corp., GSBCA 9445-P, 88-2 BCA ¶ 20,783, 1988 BPD ¶ 90, aff'd, 867 F.2d 1407 (Fed. Cir. 1989) (all exemptions applied).

applicable in a procurement for disk storage systems to support a system whose purpose was to exchange information among aircraft and ships to allow forces to participate in military missions, such as anti-submarine warfare and search and rescue operations. *Id.* 1992 BPD ¶ 348, at 4 (board also found exemption (v) applicable).

The board will not apply exemption (iii) unless the system for which ADPE is being procured sufficiently involves the command and control of military forces. ADPE for a system that an agency uses infrequently to move troops does not sufficiently involve the command and control of military forces. Contel Federal Systems, GSBCA No. 11060-P, 91-2 BCA ¶ 23,764, 119,035, 1991 BPD ¶ 33, at XXX (missing BPD pages). In Contel, the Army was procuring the design and installation of a telecommunications system at Fort Belvoir as part of its Telecommunications Modernization Project. This project, the board reasoned, was merely an administrative telecommunications service, not a dedicated command, control, and communications and intelligence network. *Id.* at 119,037, 1991 BPD ¶ 33, at XXX (missing BPD pages).

The board's interpretation of involves appears to be stricter than the interpretation that its common meaning (i.e., to relate closely) would suggest. **ADPE** that tests a system used to command and control military forces does not involve the command and control of military forces. In Cyberchron Corp., GSBCA 10263-P, 90-1 BCA ¶ 22,397, 1989 BPD ¶ 308, the agency was buying micro-test simulators to test command, control, communications and intelligence systems. The board found that ADPE was not for the purchase of a command, control, communications, and intelligence system (C³I) nor did the ADPE directly assist a C³I system in the actual command and control of military forces. Thus, the ADPE was not sufficiently involved with the command and control of military forces to

invoke exemption (iii) successfully. Id. at **112,531,1989 BPD ¶ 308**, at **4** (the board also denied application of exemption (v)).

On the other hand, ADPE used to design and develop a system that the agency used for the command and control of military forces is sufficiently involved with the command and control of military forces to support application of exemption (iii). Computer Sciences Corp. (CSC), GSBICA **10388-P, 90-1** BCA ¶ **22,538, 1989 BPD ¶ 377**. In CSC, the Army awarded a contract for systems engineering and technical assistance (SETA) services for its Communications-Electronics Command's (CECOM's) Center for Space Systems, which supported several programs, primarily the Defense Satellite Communication System and the Military Strategic Tactical and Relay Program. Id. at **113,101, 1989 BPD ¶ 377**, at **2-3**. The board specifically rejected protester's argument that involvement in CSC was less than or equal to the involvement in Cyberchron, finding that testing the equipment was not enough to invoke exemption (iii). The board reasoned that the testing functions of the contractor in Cyberchron were subsidiary to and supportive of the system design services that the agency acquired in CSC. Id. at **113,103, 1989 BPD ¶ 377**, at **6-7**.

While ADPE used for testing is not enough, ADPE that an agency used to maintain, service, and supply a system used for the command and control of **military** forces is sufficient to invoke exemption (iii). Automated Data Management, Inc., GSBICA No. **9486-P, 88-3** BCA ¶ **20,848, 1988 BPD ¶ 118**. In this case, the Army contracted for maintenance, services, and supplies (software upgrades) for its Theater Automated Command and Control System-Korea (TACCS-K) and its associated fiber optic local area network. Based on the language in the solicitation and the agency's prior Warner Amendment determination, the board determined that TACCS-K was for command and control of military forces and was for the government's use in **war** or crisis situations. Maintenance, service, and supply of

this system was sufficient involvement to exclude the procurement from the Brooks Act under exemption (iii) of the Brooks Act. Id. at 105,440,1988 BPD ¶ 118, at 6 (board also held exemption (v) applied).

D. Involves Cryptologic Activities Related To National Security

Cases involving exemption (ii), procurements that involve cryptologic activities related to national security, seldom arise before the GSBCA. The board has only applied exemption (ii) twice. Neither case, however, provides guidance for determining the boundaries of the exemption. In one case, the board provided no discussion except concluding that all five exemptions applied based on the submission of classified affidavit. See Cyberchron Corp., GSBCA 9445-P, 88-2 BCA ¶ 20,783,1988 BPD ¶ 90, aff'd, 867 F.2d. 1407 (Fed. Cir. 1989) (procurement for ruggedized automatic data processing equipment, combat support disks). In the other case, Wiltel, Inc. v. Defense Information Systems Agency, GSBCA 12310-P, **93-3** BCA ¶ 25,982, at 129,198,1993 BPD ¶ 106, at 11, the board found that exemption (ii) applied because the procurement was for a telecommunication network to transmit encrypted intelligence information concerning national security.

E. Involves Intelligence Activities

When invoked, agencies have been quite successful in getting the board to agree that exemption (i) applies. Seven cases have sought application of exemption (i), and the board has found it applicable in all but one. That one case, however, does not provide much guidance for future attempts to invoke exemption (i). Instead, it again demonstrates that the board will not find the Warner Amendment applicable unless the agency provides the board with sufficient factual detail justifying exemption from the Brooks Act. See Contel Federal Systems, GSBCA

No. 11060-P, 91-2 BCA ¶ 23,764, 119,035, 1991 BPD ¶ 33, at XXX (missing BPD pages) (exemptions (i) and (iii) inapplicable).

As in exemption (iii), to successfully invoke exemption (i) the agency must demonstrate to the board that the **ADPE** sufficiently involves the exempt purpose. As always, the board looks to the common meaning of involves in resolving exemption (i) cases. The design and development of a system used for intelligence activities sufficiently involves intelligence activities. Computer Sciences Corp. (CSC), GSBICA 10388-P, 90-1 BCA 122,538, 1989 BPD ¶ 377. In CSC, which was discussed regarding exemption (iii), the board concluded that ADPE an agency used to design and develop specifications and performance requirements for systems that are integral to intelligence activities was involved with intelligence activities. Id. at 113,103, 1989 BPD ¶ 377, at 6-7.

ADPE that assists a system that transmits intelligence information is sufficiently involved with intelligence activities to permit application of exemption (i). Cryptek, Inc., GSBICA 10680-P, 90-3 BCA ¶ 23,277, 1990 BPD ¶ 247. In this procurement, the agency was buying facsimile machines for three uses of the Headquarters North American Aerospace Defense Command. The first use was to assist DOD in providing intelligence (information, maps, positions of planes, and boats) to civilian law enforcement agencies involved intelligence activities. The second use was to transmit **and** receive highly classified **military** intelligence information. The third use was to be part of the system that transferred integrated tactical warning and attack assessment information. The board concluded that the latter two uses of the facsimile machines easily met exemption (i). The tough issue for the board was whether the transmission of information used in the “war on drugs” fell within exemption (i). After reviewing, the Executive Order requiring DOD participation in the “war on drugs” and language in the 1989 DOD Authorization Act, the board found exemption (i) applied to **all** the fax machines

because Congress concluded that the transmission of intelligence information is part of an “intelligence activity”. Id. at 116,747-50, 1990 BPD ¶ 247, at 5-8.²⁷

Exemption (i), for ADPE that involves intelligence activities, is the only exemption in which the board has rejected application of the catch-all mission critical exemption, exemption (v), but still found another exemption applicable. See Tetra Industries, GSBCA No. 9243-P, 88-1 BCA ¶ 20,301, 1987 BPD ¶ 245. In this case, the Army was buying an upgrade for a government owned computer system that supported its Intelligence and Threat Analysis Center. The computer supported a system that processed and disseminated intelligence information, including highly classified information, which during a war or emergency functioned as the nation’s primary intelligence production system. The board concluded that the agency’s documenting material was not detailed enough for application of exemption (v), but was sufficient to invoke exemption (i) Id., at 102,686, 1987 BPD ¶ 245, at 3. Nevertheless, the result in this case is anomaly and does not stand for the conclusion that application of exemption (i) requires less detailed factual support.

V. EXEMPT AND NON-EXEMPT USES IN SINGLE PROCUREMENT

Occasionally the issue arises whether a procurement is exempt from the Brooks Act due to the Warner Amendment where there is a mix of exempt and non-exempt uses. In such situations, the board will exempt the whole procurement, if the agency sufficiently details the exempt uses and demonstrates that the exempt

²⁷ See Cvberchron Corp., GSBCA 9445-P, 88-2 BCA 120,783, 1988 BPD ¶ 90, *aff’d*, 867 F.2d 1407 (Fed. Cir. 1989) (all exemptions applied); See also Intemated Svstems Group, Inc. v. Department of the Air Force, GSBCA 11955-P, 93-1 BCA 125,340, 1992 BPD ¶ 216 (Board found exemptions (i) and (v) applicable based on classified affidavit and rejected protester’s argument that Warner Amendment inapplicable if agency using GSA schedule contract); Wiltel, Inc. v. Defense Information Svstems Agency, GSBCA 12310-P, 93-3 BCA ¶ 25,982, 1993 BPD ¶ 106 (exemption (1) applies even if some non-exempt uses).

uses are the primary purpose of the acquisition. See e.g., Contel Federal Systems, GSBCA 11060-P, 91-2 BCA ¶ 23,764, 1991 BPD ¶ 33 (procurement may fall within Warner Amendment only if the primary purpose of the procurement satisfies an exempted use; here not exempt because the Army did not show any exempt primary purpose).

In a mixed-use situation, **an** agency must present detailed information establishing the primacy of the exempt usage. Racal Information Systems, Inc., GSBCA 10264-P, 90-1 BCA 122,374, 1989 BPD ¶ 315. This case involved a procurement for speed modems and related items. The agency, the Air Force, sought invocation of exemptions (iii) and (v). In an attempt to establish that the whole procurement was exempt, the agency merely listed agencies and programs that appeared to involve the command and control of **military** forces and that were mission critical. The agency, however, acknowledged that it would not devote the modems exclusively to exempt uses. Based on the lack of specificity supplied by the agency, the board concluded that the Warner Amendment was inapplicable. Specifically, the agency did not provide any information detailing the degree to which it used the modems for these programs or the amount of modems that it would buy for these programs. Thus, the board concluded that **while** there may be some support for **military** missions, absent specific evidence that the agency will largely dedicate the modems to excluded functions, no basis to exclude entire procurement. Id. at **112,428-29, 1989 BPD ¶ 315**, at **8**.

If an agency permits some secondary non-exempt use to maintain the cost effectiveness of the system, the board will still apply the Warner Amendment. Wiltel, Inc. v. Defense Information Systems Agency, GSBCA 12310-P, 93-3 BCA ¶ 25,982, 1993 BPD ¶ 106. In this case, the protester challenged a modification to a contract for services and equipment for the Defense Commercial Telecommunications Network (DCTN) as outside the scope of the original contract.

DCTN is a telecommunications system that primarily supports Warner Amendment exempt uses, such as command, control, communications, and intelligence (C³I) requirements. At times there will be incidental excess capacity for non-exempt requirements that DCTN will support. Id. at 129,194-95, 1993 BPD ¶ 106, at 2-5. Allowing this non-exempt use is necessary to maintain the cost effectiveness of the total network. DOD will permit this non-exempt use only during non-peak periods, and, if necessary, DOD can preempt the non-exempt traffic. It is not possible for the agency to indicate the exact percentage of exempt and non-exempt traffic on the network. Id. at 129,197, 1993 BPD ¶ 106, at 8.

After briefly discussing why four exemptions applied, **all** except exemption (iv), the board stated that the real issue was “whether the quantity of non-exempt activity or traffic on the network is sufficient to vitiate or compromise the availability of any of these exemptions.” Id. at 129,198, 1993 BPD ¶ 106, at 6. The board found that the non-exempt use did not compromise the application of the Warner Amendment. The board reached this conclusion because the agency designed the system to meet 100% of the anticipated needs for the exempt traffic, such as command, control, and intelligence activities if there is a crisis. The board reasoned that to the extent DOD would use the system for non-exempt purposes when the system was not fully occupied with exempt traffic **was** only logical given the high cost of the maintaining the system in its requisite state of readiness. The board posited the following standard in determining whether the Warner Amendment would apply to mixed use ADPE: “In determining whether the network is exempt, we look to its ultimate purpose and design and not to any interim use the DoD may choose to make of it for purposes of cost effectiveness.” Id. at 129,199, 1993 BPD ¶ 106, at 6, citing Computer Sciences Corp., GSBICA 10388-P, 90-1 BCA ¶ 22,538, at 113,103, 1989 BPD ¶ 377, at 6 (Board rejected protester’s argument that Warner Amendment did not apply “because a few of the programs to

be supported by the contract services do not appear to be involved with intelligence or command and control”).

The board will permit application of the Warner Amendment even if non-DOD agencies use the procurement. Management Systems Designers, Inc., GSBCA No. **9207-P, 88-1 BCA ¶ 20,404,1987 BPD ¶ 286**. In this case, the Defense Communications Agency was procuring the design of a unique automated system to permit rapid processing of agency requests for priority telecommunication services under emergency conditions. The agency intended that the system would become part of the Telecommunication Service Priority System (TSP), which will organize the provision and restoration of telecommunications service if there is a war or national emergency. Id. at **103,210, 1987 BPD ¶ 286, at 3-5**. Because of the non-DOD use, the board acknowledged that the agency did not exclusively devote the system to military purposes. Nevertheless, the Board concluded, without analysis, that the other uses did not deprive the system of its criticality to the direct fulfillment of military and intelligence missions of the highest priority. Id. at **103,210-11, 1987 BPD ¶ 286, at 4**. Because of the lack of analysis, the precedential value of **this** case is unclear.

Joseph M. Goldstein
Air Force Office of the General
1740 Air Force Pentagon
Washington, DC **20330-1740**



ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-3040

January 10, 1995

COMMAND, CONTROL,
COMMUNICATIONS
AND
INTELLIGENCE

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES
DIRECTOR, JOINT STAFF

SUBJECT: Oversight of Department of Defense (DoD) Nunn-Warner Exempted Federal Information Processing (FIP) Resource Acquisitions

The purpose of this memorandum is to issue new policy regarding the oversight of Nunn-Warner exempted FIP resource acquisitions of automated data processing equipment (ADPE) and automatic data processing software (ADPS) and services. **This** policy applies to contracts awarded under the authority of the Nunn-Warner Amendment (10 U.S.C., 2315), by the Office of the Secretary of Defense, the Military Departments, the Defense Agencies, and the DoD Field Activities. This policy applies to all future Nunn-Warner exempted FIP resource acquisitions and those with an award or Request for Proposal (RFP) issued after January 20, 1992.

The Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD(C3I)) has the responsibility and purview to ensure that Nunn-Warner exempted FIP resources are acquired in the most cost-effective manner **and** the requirement for these resources are in accordance with the Secretary of Defense's goals and objectives. To execute this portion of my responsibility, my Deputy Assistant Secretary of Defense (C3I Acquisition) **will** review all Nunn-Warner exempted FIP acquisitions costing \$100 million dollars or more.

For purpose of this policy, a Major DoD Nunn-Warner exempted FIP Resource Acquisition Contract is one that has an estimated cost, actual cost **or** maximum order limitation of \$100 million or more for FIP resources during the **full** contract life; or the acquisition **has** a cost of \$25 million or more in a single year; or it is designated **as** being of special interest by the ASD(C3I). For purpose of determining the estimated contract **costs** for Nunn-Warner exempted FIP resource acquisitions, the estimated costs for the base year and all options and options years shall be **used**.

To facilitate this review, all DoD components shall provide to the DASD(C3I Acquisition), a synopsis of future Nunn-Warner exempted FIP resource acquisitions **45** days prior to release of the RFP or contract award, whichever is the earliest. For contracts awarded since January 20, 1992, DoD components shall provide a status report on each of the contracts **to** the DASD(C3I Acquisition) no later than 60 days from the

ATCH. 4

date of this memorandum. Attachment A to this letter provides the format **to** be used for both the synopsis and status report. These reports are to be furnished to my DASD (C3I Acquisition), Room 3E243, the Pentagon, 6000 Defense Pentagon, Washington, D.C. 20301-6000.

As oversight is a continuous process, I expect to be kept fully informed of substantive issues concerning these acquisitions and existing Nunn-Warner exempted FIP resource contracts as they occur.

Please direct any questions to my action officer, Mr. Charles McClam,
(703) 614-1802.


Emmett Paige, Jr.
Emmett Paige,

Attachment

**FORMAT AND INSTRUCTIONS FOR NUNN-WARNER FEDERAL
INFORMATION PROCESSING (FIP) RESOURCE ACQUISITIONS REPORTING**

SECTION I. INTRODUCTION.

- A. TITLE: (Enter name of acquisition, system, subsystem or program).
- B. COMPONENT NAME: (Enter name of DoD lead component, e.g., Army).
- C. PROGRAM MANAGER: (Enter name, phone number, and e-mail address).
- D. DESCRIPTION: (Enter computer resource nomenclature and a functional description of the FIP resource acquisition and describe the requirement to be satisfied by this acquisition).
- E. SCOPE: (Describe scope of procurement and projected deployment dates).

SECTION 11. ACQUISITION MANAGEMENT SUMMARY.

- A. ACQUISITION STRATEGY/PROJECTED AWARD DATE: (Describe the acquisition strategy plan and provide the projected awarded date).
- B. CONTRACTTYPE/COSTS/PERIOD OF PERFORMANCE: (Detail contract costs, contract type, and the contract period of performance).
- C. TYPE /NUMBER OF UNITS: (Identify the software, hardware, maintenance, support services, equipment, and related supplies and services. Detail the number of units required for each year of the acquisition).
- D. APPLICABLE JUSTIFICATION: (Provide justification on which the Warner-exempted acquisition was based. This section should identify by name and phone number the Warner Determination Authority and provide a detailed description of the specific military mission to which the FIP resources will be applied. Additionally, provide a copy of **any** previous Warner exemptions that have been granted in connection with the system, subsystem, or program being addressed in the current FIP acquisition).

SECTION 111. OTHER PROGRAM CONCERNS:

- A. **EXTERNAL** INTEREST: (Self Explanatory).
- B. SUBSTANTIVEISSUES: (Self Explanatory).

Attachment

EXAMPLE ONLY

**JUSTIFICATION
WARNER-EXEMPTION REQUEST
AFSMSAG "CAMPAIGN ANALYSIS SUPPORT CONTRACT"**

Contract Strategy. The contract strategy is to award a one year basic contract with four one year options with a projected funding profile of

FISCAL YEAR	MIN AMOUNT	MAX AMOUNT
FY94	\$ xxx K	\$xxx K
FY95	\$ xxx K	\$xxx K (Option Year)
FY96	\$ xxx K	\$xxx K (Option Year)
FY97	\$ xxx K	\$xxx K (Option Year)
FY98	\$ xxx K	\$xxx K (Option Year)

The contract should be awarded in 2nd quarter FY94 to minimize the impact to the current AFSMSAG studies and analysis capability. AFSAA/SAG has been discussing contracting strategy options with AFDW and is pursuing a sole source justification for a time and material contract with task orders.

CONTRACT PURPOSE

This contract's primary purpose is to support the studies and analysis performed by the Air Force Studies and Analysis Agency's (AFSAA) Campaign Analysis Division in the Force Application Directorate (SAG). SAG uses campaign level models of theater combat in support of force structure decisions affecting the Air Force program, to evaluate the contribution of weapon systems to the combat outcome, and to determine the impact of force deployment options at the theater level. This contract will support Secretary of the Air Force, Chief of Staff of the Air Force, and Air Staff Program Objective Memorandum (POM) and Budget Estimate Submission (BES) decisions as well as Cost and Operational Effectiveness Analyses (COEAs). The campaign model used by SAG is TAC THUNDER. TAC THUNDER has been used to assess the relative contribution of high interest weapon systems to the air campaign portion of conventional air-land combat. SAG uses extensive threat scenarios that flow directly from the national defense intelligence channels. This contract will be used to maintain and standardize the databases required to run the engagement and mission level models which feed TAC THUNDER and effectively manage the resultant TAC THUNDER output for analysis.

Subject: Warner-Exempt Designation for the AFSMSAG Campaign Analysis Support Contract

1. The following information documents the Warner-Exempt designation requirements IAW AFR 700-4, Vol. II(C1), 6 February 1990, paragraph 34.b and is provided to support the 7CG determination requirements.

(1) Warner-exempt system name: "Campaign Analysis Support Contract" New Procurement Action

(2) Warner-exempt system functional description: Contract effort to provide modeling and simulation capability for theater level campaign analyses. The contract provides the technical support to upgrade and enhance the AFSMSAG TAC THUNDER model, methodologies, and associated data bases required for campaign level analysis.

(3) Warner-exempt system purpose codes: (Purposely left blank)

(4) Warnerexempt system user and planned deployment date: AFSMSAG and the National Defense University (NDU) are the primary users of TAC THUNDER. AFSMSAG is responsible for the configuration control and dissemination of the model and associated data bases. It is anticipated that the contract vehicle will be in place NLT 2nd QTR FY94.

(5) Projected number of Warner-exempt systems: There are several other agencies/organizations using TAC THUNDER. These users include the Aeronautical Systems Center, the United Kingdom (Ministry of Defense), and the Royal Air Force - Cranwell. The contract vehicle is designed to support any government agency needing a campaign level analysis capability.

(6) Projected Warner-exempt system life cycle costs: (See projected funding profile and contracting strategy)

(7) Relationship to other Air Force, other component, or DoD systems, mission critical or nonmission critical: **This** contract will provide the time critical campaign level analysis and technical support to upgrade and enhance the tools required by AFSMSAG to meet current and projected Secretary of the **Air** Force, Chief of Staff of the **Air** Force, and **Air** Staff Program Objective Memorandum (POM) and Budget Estimate Submission (**BES**) analyses as well as various Cost and Operational Effectiveness Analyses (COEAs). AFSAA/SAG's mission is to conduct studies and analysis within the Air Force mission areas to support the resource allocation and **Air** Force leaders. This procurement is critical to the success of the Campaign Analysis Division.

(8) Projected Warner-exempt system acquisition schedule:

6 Oct. 93 - Warner Exemption granted

Nov. 93 - Sole Source justification and authorization

Nov. 93 - Commerce Business Daily Announcing sole source contract award

Jan 94 - Sole source contract solicitation (@ 120 days)

Mar 94 - Contract award

(9) Technical point of contact: Captain xxxxx, **AFSMSAG**,
(703)xxxxxxx.

(10) Supporting information: **see** attached statement of work synopsis for the new Campaign Analysis Support Contract.

2. If further information is required, please contact Capt xxxxx, **AFSMSAG**, ext. **xxxxx**.

SYNOPSIS For
Campaign Analysis Support Contract's
Statement of Work

To support the Director of Modeling, Simulation and Analysis (AF/XOM), the ~~Air~~ Force Studies and Analyses Agency's (AFSAA) Force Application Directorate (SAG) evaluates the combat effectiveness of weapon system and determines the contribution of these systems to the outcome of key objectives for theater-level combat. SAG often responds to short notice requests to assess the relative contribution of high interest weapon systems to the air campaign in conventional air-land combat scenarios. These analyses require an accurate representation of the air campaign component, as well ~~as~~ the ground combat methodologies used in conventional air-land combat. To examine the **military** potential of new or enhanced weapon systems, SAG must have access to flexible and state-of-the-art theater level models. SAG currently owns and maintains the TAC THUNDER model. TAC THUNDER is a two-sided, theater level model designed to simulate conventional air-land combat. TAC THUNDER integrates detailed air campaign methodologies with the ground combat methodologies used by the US Army Concepts and Analysis Agency. Furthermore, SAG's evaluations must include the current intelligence estimates of the threat for the high interest scenarios. SAG must effectively and efficiently manage the extensive databases required to run the engagement and mission level models whose output feeds TAC THUNDER. This work effort provides the flexible contractual vehicle needed to obtain the technical model, analyses and database support required for SAG to conduct campaign level analyses. Work shall include: software upgrades for new weapon system capabilities and documentation; SIMSCRIPT II.5 and SIMGRAPHICS 11.5 compiler modifications; model training and user community support; prompt on-site campaign analyses support; database development, maintenance, and documentation; model and database configuration management and verification, validation, and accreditation activities; and campaign level analysis support ~~as~~ required. Software changes shall be compatible with previous TAC THUNDER versions and associated databases, and should maintain the interface with existing graphics analysis tools. Analysis support shall include all aspects and phases of the air and ground based campaigns of theater air-land combat. User support shall include on-call support to identify, isolate, and correct model and database problems; and assist in study and database preparation and/or execution. Tasks shall focus on the TAC THUNDER model and associated data bases and methodologies. However, the contract will be open to future advances in the state-of-the-art campaign level analysis tools and methodologies.

SCOPE OF SUBPART

Intelligence Systems

Description

The database initiative to be completed under this effort integrates intelligence information regarding target, order of battle, and other scenario information from DIA's intelligence data bases, the **IDB**, and the multispectral force deployment list. This initiative will create a new, universal source of scenario related data required by all AFSAA/SAG models (e.g., TAC THUNDER, TAC RAM, TAM, EADSIM, etc.). The database will be populated **I**AW the Defense Planning Guide (DPG) for the high interest major regional contingencies. This initiative facilitates the scenario development process, reduces the workload for using models to support weapon system evaluations, and establishes a credible/critical mechanism for **linking** engineering, mission, and theater level analysis tools and methodologies.

Integral Part of a Weapon System

Research & Development

Campaign level analysis tools, specifically TAC THUNDER, will support the Cost & Operational Effectiveness Analyses (COEAs) for current and future Air Force weapon systems. TAC THUNDER is used to determine weapon system contribution to the outcome of key objectives to the theater level conflict. TAC THUNDER, for example, played a critical role in the AX and **AIM-9X** COEAs.

Critical to the Direct Fulfillment of Military or Intelligence Missions:

War planning systems

The Campaign Analysis Division used TAC THUNDER to support Desert Storm war planning activities. TAC THUNDER is used to evaluate the combat outcome for theater level combat force deployment and **mix** options being considered by **Air** Force leaders. In addition, the National Defense University, War Gaming & Simulation Center (WGSC) supports the Joint and Combined Warfare (JCW) curriculum of the National War College by using TAC THUNDER in their air campaign elective. TAC THUNDER is used to exercise and provide combat adjudication of the **air** campaigns developed **as** a training exercise by students.