

**GAO**

Briefing Report to the Chairman,  
Subcommittee On Employment and  
Housing, Committee on Government  
Operations, House of Representatives

October 1986

**MERIT SYSTEMS  
PROTECTION BOARD**

**Costs Considered in  
Awarding Court  
Reporting Contracts**



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United States  
General Accounting Office  
Washington, D.C. 20548

General Government Division

B-222724

October 20, 1986

The Honorable Barney Frank  
Chairman, Subcommittee on Employment  
and Housing  
Committee On Government Operations  
United States House of Representatives

Dear Mr. Chairman:

Your letter of February 4, 1986, expressed concern that the Merit Systems Protection Board's San Francisco Regional Office had reportedly awarded a contract for court reporting services without considering the cost of transcripts purchased by other government agencies and individuals. You asked us to determine

- whether this was an isolated incident at one regional office, or whether the Board regularly followed this practice in awarding court reporting contracts;
- whether there were other areas, such as scheduling hearings, where the Board has been guided solely by its own costs; and
- how the Board's procedures for evaluating costs for court reporting contracts and scheduling hearings compared with procedures used by other agencies.

After briefing your office, we agreed to provide a written report of our findings. Our findings are summarized below and are detailed in Appendix I.

We examined court reporting contracts and conducted interviews from February to May 1986 and found that the Board generally awarded its court reporting contracts without considering costs to other government agencies or individuals. This practice does not violate existing laws, so long as the Board continues to insure that appellants have access to copies of transcripts, whether written or recorded, at reasonable costs. We found, however, that the Board's court reporting small purchase solicitations could be improved, and we are recommending that the Board's Chairman revise future solicitations to ensure all firms are able to submit informed quotes and to protect against unreasonable prices to other government agencies and individuals.

Our examination of Board regulations and discussions with agency officials and appellant attorneys did not disclose any other areas where the Board appeared to be guided solely by its own costs. In deciding where to hold hearings, for example, Board procedures call for holding them in any one of 106 cities. Usually the location closest to the agency and employee involved in the case is selected. This policy appears to be a reasonable compromise to limit travel costs for the Board and other parties.

Procedures for evaluating costs for court reporting contracts and scheduling hearings differed at the other agencies we contacted. For example, the Board uses tape recordings made during hearings as transcripts and therefore emphasizes recording fees in its evaluations. Other agencies rely on written transcripts and therefore emphasize transcription fees in their evaluations.

In written comments on our report, the Board stated that it would take actions on recommendations regarding solicitations for court reporting services. However, the Board's letter did not address the need to place a ceiling on unevaluated items, such as copies of written transcripts. (See Appendix II.)

As arranged with your office, we are sending copies of this report to the Chairman of the Merit Systems Protection Board and others on request.

If there are any questions regarding the contents of this briefing report, call Rosslyn Kleeman on (202) 275-6204.

Sincerely yours,

*W. J. Anderson*

William J. Anderson  
Assistant Comptroller General  
General Government Programs

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ABBREVIATIONS

ACME	ACME Reporting Company Incorporated
CSR	California Shorthand Reporting
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FLRA	Federal Labor Relations Board
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board

MSPB COURT REPORTING CONTRACTSBACKGROUND

Under the Civil Service Reform Act of 1978 (P.L. 95-454, 92 Stat. 1111 (1978)), federal employees have the right to appeal certain adverse or discriminatory actions taken against them by their agency to the Merit Systems Protection Board (MSPB). They also have the right to an MSPB hearing, for which a transcript will be kept (5 U.S.C. 7701(a)(1)(1982)).

Until December 1981, MSPB met the requirement for keeping a transcript by having private court reporting firms prepare written transcripts for each hearing. MSPB purchased transcripts for itself, the other federal agency involved, and the appellant. In fiscal year 1981, the last full year that these procedures were in effect, MSPB spent about \$1.2 million for court reporting services.

In December 1981, because of budget reductions, MSPB decided to stop buying written transcripts for each hearing. Since then, MSPB has required court reporters to record hearings on audio cassette tapes, and MSPB uses these tapes for preparing its decisions. MSPB also stopped purchasing transcripts for other parties. If other parties want duplicate tapes or written transcripts, they must purchase them directly from the court reporting firm. Appellants can avoid paying for transcripts, however, if they show that they cannot afford them. In fiscal year 1985, MSPB spent about \$336,000 for court reporting services.

This assignment was precipitated in part by a complaint from a court reporting company in the San Francisco area. The company had quoted on a contract to provide court reporting services in the San Francisco Bay Area during fiscal year 1986, but did not receive the contract. The company later claimed that it would have been judged the low quoter had MSPB considered costs to all parties in its evaluations.

OBJECTIVES, SCOPE, AND METHODOLOGY

On February 4, 1986, the Chairman of the House Subcommittee on Employment and Housing, Committee on Government Operations, asked us to answer the following questions:

- (1) Is the reported practice by the San Francisco Regional Office of awarding court reporting contracts without concern for the cost to other parties an isolated incident at one regional office, or does MSPB regularly follow this practice in awarding court reporting contracts?

(2) Are there other areas, such as scheduling hearings, where MSPB has been guided solely by its own costs?

(3) How do MSPB's procedures for evaluating court reporting contract costs and scheduling hearings compare with procedures used by other agencies?

To answer these questions we examined 26 court reporting contracts awarded by the MSPB regional offices in Atlanta, Philadelphia, St. Louis, and San Francisco. We also held discussions with officials from the four regional offices; MSPB's headquarters in Washington; and Army, Navy, and U.S. Postal Service units in the San Francisco Bay Area. In addition, we interviewed attorneys with four law firms and headquarters officials of the Equal Employment Opportunity Commission (EEOC), Federal Labor Relations Authority (FLRA), and National Labor Relations Board (NLRB).

We selected the four MSPB regions because their estimated expenditures for court reporting contracts were the largest of MSPB's 11 regions in fiscal year 1986. We talked to officials of the Army, Navy, and Postal Service because they had been involved in recent cases before the MSPB in San Francisco. We selected the private attorneys from MSPB's listing of attorneys who frequently represent clients before the MSPB, and we contacted the EEOC, FLRA, and NLRB because their comparative practices were of particular interest to the subcommittee.

We made our review in accordance with generally accepted government auditing standards.

#### COURT REPORTING CONTRACTS

Generally, MSPB's 11 regional offices contract for court reporting services for specific geographic areas. In fiscal year 1986, the regional offices had 63 such contracts with an estimated cost to MSPB of \$368,000. The four regional offices in our review had 26 contracts with an estimated cost to MSPB of \$209,300. We found that

--In awarding court reporting contracts, MSPB regional offices generally did not consider costs to other government agencies and individuals.

--In evaluating quotes, MSPB is not required under existing laws and regulations to consider cost to other parties so long as it continues to insure appellants have access to copies of transcripts, whether written or recorded, at reasonable costs.

- The contract for court reporting services in the San Francisco Bay Area has been less costly for MSPB, but more costly for other parties because they have purchased written transcripts rather than duplicate tape recordings.
- MSPB can improve its contract solicitations to ensure all quoters submit informed quotes and to protect against unreasonable prices to other government agencies and individuals.

Evaluation procedures generally did not consider costs to other parties

At three of the four regional offices we contacted, MSPB evaluations for court reporting contracts considered only MSPB's costs and did not consider costs to other parties. Evaluations at the fourth regional office considered costs to all parties.

The Atlanta, Philadelphia, and San Francisco regional offices requested quotes using a sample solicitation provided by MSPB's headquarters. The solicitations do not estimate how many hearings will be held or how many transcripts would be purchased. The solicitations required quoters to submit prices for two types of services: (1) hearing tape recording fees to be paid by the region and (2) transcription fees for parties who purchase written transcripts. The price for duplicate tape recordings was set in the solicitation for all quoters. For example, the San Francisco Regional Office requested prices for each of the following:

- 4-hour audio tape recordings,
- 8-hour audio tape recordings,
- original written transcripts ordered by MSPB or any party, and
- copies of written transcripts ordered by any party after an original transcript has been provided.

In addition, the San Francisco request stated that, if an original written transcript was ordered by any party other than MSPB, MSPB would be provided with a free copy of the transcript.

To evaluate such quotes, the three regional offices estimate the number of hearings they expect to hold and the number of pages of written transcripts they alone expect to buy. They award contracts to the lowest quoter based only on their own unstated, estimated audio tape and written transcription needs and the prices quoted for audio recordings and original transcription; they do not consider the cost of written

transcripts to other government agencies and appellants. The fourth regional office, the St. Louis Regional Office, also used the sample solicitation, but evaluated costs to all parties, including appellants.

Thus, for court reporting services in the San Francisco Bay Area during fiscal year 1986, MSPB's San Francisco Regional Office evaluated quotes from ACME Reporting Company, Inc. (ACME), and California Shorthand Reporting (CSR) as shown in table I.1. In evaluating the quotes, the regional office estimated that it would hold 232 4-hour hearings and 58 8-hour hearings during the year and that it would buy 600 pages of written transcripts. The regional office did not consider how many pages of written transcripts would be bought by other government agencies and appellants. Based on its evaluation, ACME was the lowest quoter.

TABLE I.1: Evaluation of Two Quotes for San Francisco Bay Area Contract

Tape Recordings:

	Quotes per hearing		Estimated number of hearings	Estimated recording costs	
	ACME	CSR		ACME	CSR
4-hour hearing	\$16	\$75	232	\$3,712	\$17,400
8-hour hearing	72	100	58	4,176	5,800

Written Transcripts:

	Quotes per page		Estimated number of pages	Estimated transcript costs	
	ACME	CSR		ACME	CSR
Originals	2.85	1.95	600	1,710	1,170
Copies	1.85	.35	0	-	-
Total Estimated Costs				\$9,598 =====	\$24,370 =====

MSPB's approach complies with existing laws and regulations

MSPB's approach to evaluating quotes for court reporting contracts does not violate procurement regulations in that the regulations do not require agencies to consider costs to other parties. On the other hand, we could find no regulation that would prevent MSPB from considering costs to other parties. In addition, MSPB's practice of having its hearings tape recorded

and making copies of tape recordings available to appellants at a reasonable cost appears to comply with laws requiring agencies to keep transcripts and to make them available to appellants at a reasonable cost.

Procurement regulations applicable to MSPB's court reporting contracts provide no guidance as to which costs should be considered in evaluating quotes. The regulation covering solicitation and evaluation of quotations, for example, does not specify which costs should be considered during evaluations. (See Federal Acquisition Regulation (FAR), 48 C.F.R. 13.107 (1985).)

MSPB must follow two laws with regard to transcripts: (1) the Civil Service Reform Act, which requires that MSPB keep a transcript of its hearings; and (2) the Federal Advisory Committee Act, which requires that MSPB make a copy of the "transcripts" available to appellants at a reasonable cost.<sup>1</sup>

MSPB believes that tape recordings meet the Civil Service Reform Act's requirement for transcripts. In September 1985, in a case unrelated to the MSPB, the U. S. Court of Appeals agreed. (Gonzales V. Defense Logistics Agency, 772 F.2d 887 (1985)) The court stated that, although a transcript is commonly thought of as a written document, Black's Law Dictionary defines a transcript as "a copy of any kind."

MSPB also complies with the Federal Advisory Committee Act's requirement to make copies of transcripts available to appellants at a reasonable cost. The contracts in the four regions we reviewed stated that appellants and other parties could buy copies of recorded transcripts for \$2.50 to \$10.00 each, depending on the region. The San Francisco Regional Office, for example, set the price for a duplicate tape at \$10.00 in its contract with ACME based on its assessment of the cost of having tape recordings duplicated by a private firm. At our request, the San Francisco Regional Office examined 13 recent cases and found that, on the average, tape recordings held the equivalent of 50 written pages. For these cases, the \$10.00 price for a tape would be equivalent to an average price of \$.20 for each written page, much less than the cost of a page of written transcript.

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<sup>1</sup>The Federal Advisory Committee Act, 5 U.S.C. App. 11 (1982), requires agencies to make available copies of transcripts to any person "at actual cost of duplication." Our Office has held that this requirement imposes a duty on agencies to insure that duplicating services are available at reasonable prices. See Hoover Reporting Co., B-185261, July 30, 1976, 76-2 CPD 102.

Comparison of costs to all parties under one contract

We compared actual costs to MSPB and other parties under the ACME contract for court reporting services in the San Francisco Bay Area to projected costs using CSR prices. We found the contract has been less costly to the government, but more costly to appellants. Appellants have paid more under the ACME contract because they purchased written rather than recorded transcripts. Table I.2 shows costs to all parties during the first 4 months of fiscal year 1986 under the ACME contract and what the costs would have been under a contract with CSR. The table shows that the government overall saved \$116, even though other federal agencies had to pay an additional \$1,685 under the ACME contract.

TABLE I.2: Comparison of Actual Costs during the First 4 Months of Fiscal Year 1986 under the ACME Contract with Projected Costs using CSR Prices

	<u>ACME</u>	<u>CSR</u>	<u>Difference</u>
MSPB	\$2,224	\$4,025	(\$1,801)
Other agency	<u>3,322</u>	<u>1,637</u>	<u>1,685</u>
Total government	<u>5,546</u>	<u>5,662</u>	<u>(116)</u>
Appellant	<u>6,306</u>	<u>3,709</u>	<u>2,597</u>
Total	\$11,852 =====	\$9,371 =====	\$2,481 =====

ACME records indicate that appellants have bought written transcripts rather than tape recordings. The four appellant attorneys we contacted were divided over the utility of tape recordings. Two attorneys said they were not aware that tapes could be purchased, and said the tapes would be an adequate substitute for written transcripts under certain circumstances. Two other attorneys stated that tapes were too troublesome. One stated, for example, that she found tapes to be difficult to use and ultimately had her secretary transcribe them.

MSPB's solicitations could be improved

The court reporting contracts awarded by the four regional offices that we reviewed were handled as small purchases, and the Competition in Contracting Act of 1984 does not require small purchase solicitations to include a statement of all significant

evaluation factors. (See 41 U.S.C. 253a (b)(1) [Supp. III 1985].) Nevertheless, small purchases must be conducted consistent with the concern for fair and equitable competition that is inherent in any procurement. We believe MSPB can improve its solicitations by

- clearly stating the basis on which quotes will be evaluated to ensure that all firms can prepare informed quotations; and
- placing ceilings, such as the current provision of tape copies for no more than \$10.00, on line items that will not be evaluated to protect against unreasonable prices for these items.

Generally, solicitations should clearly state the basis for evaluation so that firms can submit informed quotes. (See North American Reporting, Inc. et al, 60 Comp. Gen. 64 [1980].) The evaluation and award factors in MSPB's solicitations did not reveal to the quoters that only some of the items solicited would be evaluated for award, i.e., only MSPB's own costs. Also, the San Francisco Regional Office, as shown in table I.1, estimated that it would buy 600 pages of original transcripts but did not include this figure in the solicitation. Rather, the solicitation merely stated that the regional office expected to buy written transcripts for 1 to 2 percent of the proceedings. We believe quoters should be provided all the information that might be important to formulate an intelligent quote on a common basis and not have to guess the anticipated requirements (60 Comp. Gen. 64 [1980]). Because quoters cannot compete on an equal basis unless they know in advance which items actually will be evaluated, MSPB should inform quoters fully of the basis for evaluation.

Solicitations should also protect against unreasonably high prices to government agencies and individuals for items that MSPB does not evaluate. MSPB solicitations fail to do this. By not evaluating certain items, MSPB risks obtaining low prices for evaluated items and unreasonably high prices for unevaluated items. For example, firms were required to quote prices for copies of written transcripts, but the San Francisco Regional Office did not consider this price in determining the low quoter. Therefore, as shown in table I.1, the fact that ACME quoted \$1.85 per page for copies and CSR \$.35 did not affect the outcome of the award. One way to protect against unreasonably high prices is to place a maximum price in the solicitation on any item that will not be evaluated. (See North American Reporting, Inc. et al., 60 Comp. Gen. 64, supra.)

### HOW MSPB DECIDES WHEN AND WHERE TO HOLD HEARINGS

MSPB policy pertaining to when and where hearings are scheduled takes into consideration costs to other parties. Presiding officers schedule hearings to meet a 120-day deadline for issuing decisions, measured from the date of an appeal. MSPB's regulations allow any party to petition to change the date of a hearing and require presiding officers to grant petitions that cite a good cause. None of the three agency officials we contacted complained about hearing schedules. Two of the four appellant attorneys we contacted stated that presiding officers should be more flexible in changing hearing schedules, but they did not generally believe that the scheduling process increased appellants' costs.

MSPB has changed its policy on hearing locations several times. Initially, MSPB's policy was to hold hearings at any location convenient to the appellant, agency, and witnesses. Presiding officers traveled to these locations. In November 1981, as a result of budget cuts, MSPB officials temporarily stopped holding hearings. When hearings resumed in February 1982, MSPB officials decided to hold them only in its 11 regional offices to minimize MSPB travel costs.

In November 1982, MSPB decided sufficient funds were available to again hold hearings outside its regional offices. However, to conserve its resources, MSPB determined that hearing locations would generally be limited to 92 specified cities. Regional Directors could authorize travel to other cities if it was determined to be more advantageous to all parties.

In June 1985, MSPB increased the number of approved cities to 106, and hearings are currently held in one of the approved cities unless the regional director or presiding officer decides another location is more appropriate. Our discussions with agency officials and appellant attorneys indicated they believe this to be a reasonable compromise between the competing interests of MSPB, other federal agencies, and appellants.

### COMPARISON OF MSPB'S PROCEDURES TO THOSE AT OTHER AGENCIES

Approaches to evaluating court reporting contract costs and policies for deciding where hearings are held differ among MSPB, EEOC, FLRA, and NLRB.

With regard to court reporting contracts, the EEOC requires the agency at which the complaint arose to contract for court reporting services; thus, the EEOC is not involved in bid

evaluations. Both the FLRA and NLRB, on the other hand, contract and pay for their own transcripts. However, the FLRA and NLRB usually buy written transcripts, and their evaluations focus on the cost of written transcripts. The price of duplicates is not competed, and they control the cost of duplicate transcripts to other parties by setting the price per page for duplicates in the solicitation.

EEOC, FLRA, and NLRB policies on where hearings are held also differed from MSPB's policies. EEOC usually holds its hearings at the agency where the complaint arose and requires that agency to provide a hearing room. The FLRA and NLRB attempt to hold hearings in their regional office hearing rooms or in hearing rooms near where the complaint occurred.

#### CONCLUSIONS AND RECOMMENDATION

MSPB's failure to consider costs to other parties in its court reporting contract evaluations does not violate current laws or procurement regulations. As long as MSPB continues to insure that copies of tape recordings are available at reasonable costs it meets the requirements of the Federal Advisory Committee Act.

However, we believe MSPB's solicitations for court reporting services (1) prevented firms from preparing informed quotes and competing on an equal basis and (2) did not adequately protect against unreasonable prices to other government agencies and individuals. Therefore, we recommend that MSPB's Chairman revise future solicitations to clearly state the evaluation criteria and to place maximum amounts on unevaluated items.

#### AGENCY COMMENTS

In a letter dated September 12, 1986, MSPB stated that it would take actions on our recommendations. Specifically, MSPB has instructed its regional offices to add a clause to all court reporting solicitations stating the evaluation criteria which will be used in evaluating the quotations. MSPB also now requires that each solicitation place a ceiling of \$7.50 on the amount that may be charged for copies of the tapes of a proceeding. However, MSPB's letter did not address the need to place a ceiling on unevaluated items, such as copies of written transcripts. MSPB's comments are included in Appendix II.



## U.S. MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

The Managing Director

SEP 12 1986

Mr. William J. Anderson  
Director  
General Government Division  
General Accounting Office  
Washington, D.C. 20548

Dear Mr. Anderson:

As requested in your letter dated August 21, 1986, (addressed to Acting Chairman Maria Johnson) I have reviewed the draft report entitled MERIT SYSTEMS PROTECTION BOARD: Costs Considered in Awarding Court Reporting Contracts.

Your report indicated that the Merit Systems Protection Board's policies in obtaining court reporting services do not violate current laws or procurement regulations. Nevertheless, your report contained two recommendations for improvement of the Board's solicitations for procuring these services.

Specifically, the report suggested that the Board's solicitations (1) clearly state the basis on which quotes will be evaluated to ensure that all firms can prepare informed quotations; and (2) place ceilings on line items that will not be evaluated to protect against unreasonable prices for these items, such as the limit on the amount to be charged for copies of tapes.

Although your report did not prescribe any required actions, please be advised that we have taken the following actions to strengthen our procedures in light of your recommendations.

-2-

As most of our regional offices had commenced their solicitation process prior to our receipt of your draft report, we held a teleconference call with all eleven offices on August 27, 1986 to advise them of the following requirements:

1. In addition to information on the expected number of hearings and number of transcripts, each solicitation is to include a clause stating the evaluation criteria which will be used in evaluating the quotations.
2. Each solicitation is to provide a cap of \$7.50 on the amount which may be charged the parties by the court reporters for copies of the tapes of a proceeding.

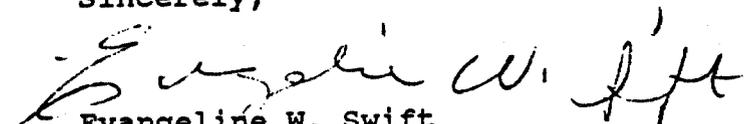
Offices which had already sent out their requests for quotations were told to send out amendments to their solicitation.

A written confirmation of the information provided at the teleconference, including an example of a possible evaluation clause, was sent out the same afternoon via our electronic mail system (copy enclosed).

I believe that our actions are responsive to your recommendations. I appreciate receiving a copy of the draft report for review and thank you for the opportunity to provide comments.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

  
Evangeline W. Swift

Enclosure

FROM: OCC

DATED: 08/27/86

TO: SLRD

SUBJECT: Suggested Evaluation Clause

To confirm the Tele Conference call if you have not included an evaluation clause in your Court Reporting bid proposal (RFQ) use the following

I The bid proposals will be evaluated as follows:

- a) \* one to four hour hearing = 45% Factor
- b) \* four to eight hour hearing = 50% Factor
- c) \*\* Transcription costs = 5% Factor
  - \* Travel costs must be included in the recording costs
  - \*\* assume 10 days delivery/100 pages per case

The factors are determined by the number of hearings held the previous year i.e. number of 4 hour, and number of 8 hour hearings.

II Also it has been determined that everyone will put a cap on copy of tape cost (see page 12 of contract) at Seven dollars and fifty cents (\$7.50).

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\*\*\*\*\* End of Letter # 6525



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