



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** American Federation of Government Employees, AFL-CIO; American Federation of Government Employees, AFL-CIO, Local 987; Laverne J. Rucker; Gary Fowler; Donald E. Thompson; Larry Baines

**File:** B-282904.2

**Date:** June 7, 2000

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### DIGEST

Federal employees and the unions representing them, who assert that they will be adversely affected by an agency's decision made pursuant to Office of Management and Budget Circular No. A-76 to contract for work rather than perform it in-house, are not actual or prospective bidders or offerors, and thus are not interested parties eligible to maintain a protest at the General Accounting Office.

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### DECISION

The American Federation of Government Employees, AFL-CIO; American Federation of Government Employees, AFL-CIO, Local 987; Laverne J. Rucker; Gary Fowler; Donald E. Thompson; and Larry Baines protest the award of a contract to EG&G Logistics, under request for proposals (RFP) No. SPO700-99-R-7003, issued by the Defense Logistics Agency, for material distribution services at the Defense Distribution Depot, Warner Robins, Georgia. The award results from a decision made in accordance with Office of Management and Budget (OMB) Circular No. A-76 to contract for the services rather than perform them in-house.

We dismiss the protest because the protesters are not "interested parties" who may protest under the statute governing our process.

OMB Circular No. A-76 establishes the executive branch's policy regarding performance of commercial activities that are incidental to the performance of

governmental functions. It outlines procedures for determining whether commercial activities should be performed under contract by private enterprise or in-house using government facilities and personnel. OMB Circular No. A-76 and the Revised Supplemental Handbook (Mar. 1996) (Supplemental Handbook) set out the steps of the cost comparison process.

First, a performance work statement (PWS) is drafted. The PWS is to reflect the government's needs, and establish performance standards and measures that provide for a common basis of evaluation and ensure comparable levels of performance for the government's in-house plan and the private-sector offers. Federal Acquisition Regulation (FAR) § 7.304(a); Supplemental Handbook at 10. The PWS serves as the basis for the solicitation that is issued to private-sector offerors, as well as the basis for the agency's proposed in-house management plan. FAR § 7.304(c); Supplemental Handbook at 12. Once the PWS has been drafted, the competition among private-sector offerors can be held and a private-sector proposal selected for the public/private cost comparison.

The agency's in-house management plan is to reflect the scope of the PWS, and describe the government's Most Efficient Organization (MEO). The management plan is also to include, among other things, the in-house cost estimate, which describes all costs associated with performance by the MEO of the requisite activities. FAR § 7.304(b); Supplemental Handbook at 11.

After certain steps have been taken to ensure that the selected private-sector offer and the management plan are comparable in terms of performance standards and that the costs associated with the management plan are justified, the contracting officer opens the government's in-house cost estimate for comparison with the private-sector offeror's proposed price. *Id.* at 13. Should the cost comparison result in the determination that the activities should be performed in-house using government facilities and personnel, the solicitation that was issued to the private-sector offerors is canceled, FAR §§ 7.302(b), 14.404-1(c)(9), 52.207-1, 52.207-2, and the agency implements the MEO. Should the cost-comparison result in the determination that the activities should be performed by the private-sector offeror, a contract is awarded under the solicitation in response to which the private-sector offeror's proposal was submitted.

The completion of the cost comparison invokes the OMB Circular No. A-76 administrative appeals process. Supplemental Handbook at 13; see FAR § 7.307. An appeal can be filed by an "eligible appellant," which is defined as, among other things, "[f]ederal employees (or their representatives) and contractors that have submitted formal bids or offers who would be affected by a tentative decision to convert to or from in-house, contract or [interservice support agreement] performance as a result of a cost comparison." Supplemental Handbook at 13. An appeal may challenge the agency's compliance with OMB Circular No. A-76 or specific aspects of the calculations in the cost comparison. *Id.* The Supplemental Handbook states that if the agency appeal authority finds

that the initial cost-comparison decision was unsupported or erroneous, the appeal authority is to correct the error and cost comparison, and the agency is to proceed according to the amended decision. Id. The Handbook states that the appeals procedure “does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals.” Id.

Here, as mentioned previously, the cost comparison resulted in the award of a contract to EG&G Logistics. The protesters in this case first challenged that award decision through the Circular No. A-76 administrative appeals process. The agency appeal authority ultimately rejected the bulk of the appeal, and the protesters subsequently filed this protest with our Office. The individual protesters, who assert that they would have filled positions set forth in the MEO had the cost comparison resulted in the determination that the activities should be performed in-house, argue that numerous mistakes were made in the cost comparison process. The protesters contend that had the cost comparison been properly performed, the agency would have canceled the solicitation and performed the activities in-house.

Where an agency has conducted an OMB Circular No. A-76 cost comparison, thus using the procurement system to determine whether to contract out or perform work in-house, we are authorized to consider a protest filed by a private-sector offeror alleging that the agency has not complied with the applicable procedures or has conducted an evaluation that is inconsistent with the solicitation criteria or is otherwise unreasonable. See NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 5-6; Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335 at 3-4. However, we are without authority to consider a protest if filed, as here, by federal employees (or by unions representing these employees), even if they assert that they will be adversely affected by the agency’s decision to contract for the work rather than perform it in-house.

Under the Competition in Contracting Act of 1984 (CICA) (implemented in our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2000)), a protest may be brought only by an “interested party,” defined as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551(2) (Supp. III 1997). As explained below, federal employees who assert that they will be affected by the agency’s decision to contract for the work rather than perform it in-house and unions representing these employees are not interested parties eligible to maintain a protest under the applicable statute because they are not actual or prospective bidders or offerors under a solicitation. National Fed’n of Fed. Employees, B-225335.2, Feb. 5, 1987, 87-1 CPD ¶124 at 1; Jake O. Black, B-199564, Aug. 6, 1980, 80-2 CPD ¶ 95 at 2.

FAR § 2.101 defines “offer” as “a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract.” The term “contract” is in turn defined as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.” FAR § 2.101. Accordingly, in order for anyone speaking for the MEO to be considered an

offeror, the government's submission on behalf of the MEO would have to constitute an "offer," that is, be in response to a solicitation and constitute something that, if accepted by the agency, would result in a contract binding the MEO to perform the services required.

As noted above, however, the MEO in-house management plan is not submitted in response to a solicitation; solicitation responses are limited to private-sector offerors. Moreover, if a cost comparison performed in accordance with OMB Circular No. A-76 results in the determination that the activities should be performed in-house using government facilities and personnel, the solicitation issued to the private-sector offerors is canceled, and the work is performed in-house using government facilities and personnel. FAR §§ 7.302(b), 14.404-1(c)(9), 52.207-1, 52.207-2. That is, no contract is awarded (under the solicitation or otherwise) for the in-house performance of the required activities. Because no contract is awarded, nothing submitted by the government regarding the performance of the activities in-house, such as the government's in-house management plan, can properly be considered an offer. As such, no individual or entity associated with the proposed performance of the required services in-house can be considered an actual or prospective "offeror," and accordingly, the protesters here cannot be considered "interested parties" under CICA and our Bid Protest Regulations.<sup>1</sup>

The protesters, although not claiming to be actual or prospective bidders or offerors, point out that prior to the passage of CICA, the decisions of the GAO set forth a more expansive test for determining "interested party" status, under which we on occasion considered protests filed by parties who were not actual or potential bidders or offerors. Specifically, the protesters point to our decision in Marine Eng'rs Beneficial Assoc.; Seafarers Int'l Union, B-195550, Dec. 5, 1980, 80-2 CPD ¶ 418 at 1, aff'd on recon., 81-1 CPD ¶ 215, where we stated:

In determining whether a protester satisfies the interested party criterion, we examine the degree to which the asserted interest is both established and direct. In making this evaluation, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester . . . . Thus, we have recognized the rights of non-bidders to have their protests considered on the merits where there is a possibility that recognizable established interests will be

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<sup>1</sup> In contrast, Department of Defense maintenance depots are eligible to file bid protests at our Office because of their unique status as governmental activities authorized to compete as separate entities for the assignment of workload. 10 U.S.C. § 2470 (1994); B-279362, Mar. 26, 1998 (Letter from the General Counsel, General Accounting Office, to the Chairman, Subcommittee on Military Readiness of the House Committee on National Security).

inadequately protected if our bid protest forum is restricted to bidders in individual procurements.

The protesters add that prior to the enactment of CICA, our Office considered, for example, protests filed by such nonbidders or nonofferors as a labor union challenging an agency's determination that a contractor for whom union members worked was nonresponsible, District 2, Marine Eng'rs Beneficial Assoc.--Associated Maritime Officers, AFL-CIO, B-181265, Nov. 27, 1974, 74-2 CPD ¶ 298, and a parent organization concerning the propriety of an award of a contract for the operation of a day care center which the children of members of the organization attended. Department of Labor Day Care Parents' Assoc., B-183190, June 10, 1975, 75-1 CPD ¶ 353. The protesters urge that we revert to the more expansive pre-CICA test for determining "interested party" status, and find that, although the protesters here are not actual or potential bidders or offerors, they be considered interested parties, given the nature of their interests.

We note that, even prior to the enactment of CICA, our Office dismissed protests of agency decisions to contract out for services filed by unions representing federal employees and by federal employees themselves, on the basis that the protesters were not, in effect, "interested parties." See, e.g., Taxpayers Generally and Fed. Employees of Fort Eustis, Virginia, B-210188, Jan. 17, 1983, 83-1 CPD ¶ 52 (federal employees and taxpayers generally); Federal Employees Metal Trades Council, B-203818.2, Oct. 8, 1981, 81-2 CPD ¶ 288 (union); Mr. William T. Springfield, B-197752.2, Apr. 28, 1980, 80-1 CPD ¶ 301 (individual employee); Local 1662, Am. Fed'n of Gov't Employees, B-197210, Mar. 3, 1980, 80-1 CPD ¶ 169 (union); Locals 1857 and 987, Am. Fed'n of Gov't Employees, B-195733, B-196117, Feb. 4, 1980, 80-1 CPD ¶ 89 (union). Moreover, whatever flexibility our Office had in this area prior to the enactment of CICA, we are currently without authority to expand the definition in CICA and revert back to our pre-CICA test for determining interested party status.<sup>2</sup>

In any event, we would not hear a protest filed by employees or their union, because of the lack of identity between their interests and the interest of the entity competing under the procurement. We have consistently found that individual employees of disappointed bidders or offerors are not interested parties to protest on behalf of their employer. Dale Chlouber, B-190638, Dec. 30, 1977, 77-2 CPD ¶ 484 at 1-2. We have similarly declined to consider, since the passage of CICA, protests filed by unions or trade associations on behalf of their members employed by private sector bidders or offerors because the unions/trade associations are not interested parties.<sup>3</sup>

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<sup>2</sup> It is true that, in certain circumstances, we consider non-statutory protests if the agency involved has agreed in writing to have the protests decided by GAO—which is not the case here. 4 C.F.R. § 21.13(a).

<sup>3</sup> We note that the United States Court of Federal Claims (COFC) has recently held that unions and federal employees are not interested parties eligible to protest a

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Northwest Reforestation Contractors Assoc., Inc., B-240329, July 20, 1990, 90-2 CPD ¶ 61 at 1-2; American Maritime Officers Serv.: District 2, Marine Eng'rs Beneficial Assoc.-Associated Maritime Officers, AFL-CIO, B-224480, July 22, 1986, 86-2 CPD ¶ 96 at 1-2.

The protesters argue, in the alternative, that our Office should consider their protest because of the language in the Federal Activities Inventory Reform (FAIR) Act of 1998, 31 U.S.C. § 501 note (Supp. IV 1998).

The FAIR Act requires agencies to submit to OMB “a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions.” FAIR Act § 2, 31 U.S.C. § 501 note. The Director of OMB is required to review the list, and after consulting with the executive branch agency that submitted the list, provide the list to Congress, make the list available to the public, and publish a notice informing the public of the list’s availability. Id.

The Act states that “[w]ithin a reasonable time after the date on which a notice of the public availability of a list is published . . . the head of the executive agency concerned shall review the activities on the list,” and requires that “[e]ach time that the head of the executive agency considers contracting with a private sector source for the performance of such an activity, the head of the executive agency shall use a competitive process to select the source,” except as otherwise provided by law, executive order, regulation, or an executive branch circular or other guidance. Id.

The Act provides that “[a]n interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, [the published] list.”<sup>4</sup> Id. § 3. The Act specifically defines interested party as, among other things, an “officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity” and the “head of any labor organization” that represents such employees. Id.

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decision under Circular No. A-76 to contract out. American Fed’n of Gov’t Employees, AFL-CIO v. United States, No. 00-130C, slip op. at 10-32 (Fed. Cl. May 10, 2000). Specifically, the court found that the unions and federal employees were not “interested parties” within the meaning of the Tucker Act, as amended by the Administrative Dispute Resolution Act, 28 U.S.C. § 1491(b)(1) (Supp. IV 1998), which gives the COFC jurisdiction over bid protests.

<sup>4</sup> The Senate Committee on Governmental Affairs specified that “[t]he Committee intends for any challenges to the inventory list to be resolved solely at the agency level by the agency.” S. Rep. No. 105-269, at 9 (1998).

The protesters contend that because the FAIR Act “equates agency employees and their union representatives to ‘actual or prospective offerors,’” our Office should “find that displaced employees and their unions have standing to protest contracting out decisions.” Protest at 3-4.

We disagree. The legislative history of the FAIR Act indicates that it was enacted because of Congress’ concern that the policy set forth in OMB Circular No. A-76, regarding the identification of commercial activities that are incidental to the performance of government functions and determination as to whether such activities should continue to be performed in-house by government personnel or should be performed by the commercial sector, was being ignored. S. Rep. No. 105-269, at 4-6.

The Act uses the term “interested party” only to define those parties eligible to challenge, to an executive agency, the inclusion or omission of particular activities on the lists of activities identified by the agency as not inherently governmental. It makes no mention of recognizing those parties as “interested parties” for any other purpose. Nothing in the Act’s express language or in its legislative history suggests that the Act’s use or definition of the term “interested party” was intended to extend beyond the context in which it appears, so as to alter the definition of that term as set forth in CICA. See American Fed’n of Gov’t Employees--Recon., B-219590.3, May 6, 1986, 86-1 CPD ¶ 436 at 2 (the OMB Circular No. A-76’s definition of federal employees and their representative organizations as “directly affected parties” eligible to appeal to an agency a cost comparison decision made by the agency under the authority of OMB Circular No. A-76, does not authorize a similar appeal to our Office or the pursuit of a bid protest as an interested party); see also American Fed’n of Gov’t Employees, AFL-CIO v. United States, No. 00-130C, slip op. at 23-32 (Fed. Cl. May 10, 2000) (FAIR Act does not confer interested party status on federal employees or their unions for purposes of challenging at the United States Court of Federal Claims an agency’s determination pursuant to OMB Circular No. A-76 to contract for services).

The protest is dismissed.

Comptroller General  
of the United States