

**GAO AND FEDERAL COURT DECISIONS  
REGARDING  
OMB CIRCULAR A-76  
AND PUBLIC-PRIVATE COMPETITIONS**

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# GAO AND FEDERAL COURT DECISIONS

## I. GAO DECISIONS CONCERNING OMB CIRCULAR A-76

### SCOPE OF GAO REVIEW

A. Although the GAO will not review an agency's underlying decision to perform work in-house because the GAO considers such decisions as matters of executive branch policy, the GAO will review a protester's complaint that the cost comparison was faulty or misleading, or that the agency had improperly canceled the solicitation after the receipt and evaluation of offers for the purpose of conducting a cost comparison.

⇒ SRM Mfg. Co., B-277416, 97-2 CPD ¶ 40. Unsuccessful offeror protested the agency's issuance of a project order to Warner Robbins AFB. The GAO declined to review the agency's decision to perform in-house, stating that, as a general rule, it regards such decisions as matters of executive policy.

⇒ Pemco Aeroplex, Inc., B-275587.9, et al. The GAO reviewed agency's decision to perform in-house after agency had issued a solicitation, received and evaluated proposal, awarded the contract to a private entity, and then canceled the solicitation to take the work in-house.

⇒ Southwest Anesthesia Servs., B-279176, 98-2 CPD ¶ 1. In response to a solicitation cancellation, the protester argued that the agency's decision to perform the services in-house was unreasonable because a cost comparison was not conducted to measure the relative costs of in-house versus contractor performance. The GAO declined to consider the protest ground because it considers "such decisions to be a matter of executive branch policy, except where the challenged agency had used the procurement system by issuing a solicitation *for the purpose of conducting a cost comparison under [OMB] Circular A-76.*" (Emphasis added.)

B. In order to obtain GAO review, the protester must first show that it has exhausted the administrative review process for all issues raised in the protest.

⇒ Madison Servs., Inc., B-277614, 97-2 CPD ¶ 136. Protester alleged that the agency failed to adjust its proposed price to reflect a lower fringe

benefit level issued by the Department of Labor. The GAO refused to consider the issue because the issue had not been raised during the administrative appeal process.

⇒ Professional Servs. Unified, Inc., B-257360.2, 94-2 CPD ¶ 39. Protester had raised numerous issues in its unsuccessful base-level appeal of the agency's cost comparison. The protester then raised some, but not all, of these issues in a higher tier headquarters-level appeal. The GAO refused to consider the issues not raised in the headquarters-level appeal.

C. The GAO will review protests by contractors not selected for the cost comparison with the Government's in-house estimate even though the contractor has not invoked the administrative appeal process, which is unavailable to such contractors.

⇒ ITT Fed'l Servs. Corp., B-253740.2, 94-1 CPD ¶ 30. Protester argued that the agency improperly failed to select its proposal for the cost comparison. The GAO reviewed that portion of the protest concerning the agency's non-selection of the protester's proposal but declined to review the protester's complaint that the agency conducted an improper cost comparison because the protester was not an "interested party."

⇒ J&E Assocs., Inc., B-278187, 98-1 CPD ¶ 42. The GAO reviewed the merits of a protest where the protester's proposal was not selected for the cost comparison study and the protester argued that its proposal had been misevaluated.

D. Although federal employees (or their unions) may invoke the administrative appeal process, they may not invoke the GAO's bid protest jurisdiction.

⇒ Letter to Senator Jim Sasser, B-223558 (Sept. 2, 1986). GAO stated that unions or employees displaced by A-76 decisions are not "interested parties" for purposes of establishing standing to bring a bid protest action. Cf. Federal Activities Inventory Reform Act, Pub. Law No. 105-270 (discussed below).

## **BURDEN OF PROOF**

A. The protester has the burden of proving that a cost comparison was materially deficient. This burden may be met, however, if the agency has failed to document all elements of its cost comparison and this failure places the outcome of the cost comparison in doubt.

⇒ MAR Inc., B-205635, 83-2 CPD ¶ 278. The GAO recommended that the agency reevaluate its estimates where the validity of the cost comparison

could not be determined because the agency had failed to document its position regarding G&A cost estimates.

- B. In addition to showing that the agency failed to properly conduct the cost comparison, the protester must show that such failure resulted in prejudicial error, that is, the failure materially affected the outcome of the comparison.
- ⇒ Atlantic Marine Servs., Inc., B-223913, 86-2 CPD ¶ 446. The GAO denied protest where the protester made no credible showing that the cost comparison's outcome likely would have been different had the agency calculated the government's estimate in the manner advanced by the protester.
- ⇒ Joule Maint. Corp., B-210182, 83-2 CPD ¶ 389. The mere fact that the agency committed certain errors in its cost comparison did not in itself provide a basis for overturning the comparison's results; rather, the protester had to demonstrate that the failure materially affected the cost comparison's outcome.

## **STANDARD OF COMPETITION**

- A. The agency must follow the announced procedures in comparing in-house and contractor costs.
- ⇒ Monarch Enterprises, Inc., B-209904, 83-1 CPD ¶ 307. The GAO stated that where an agency uses the procurement system to aid in its decisionmaking, spelling out in the solicitation the circumstances under which it will award or not award a contract, the GAO will review the matter to determine whether mandated procedures were followed in comparing in-house and contract costs.
- B. The MEO and private contractor must be evaluated against the same performance work statement.
- ⇒ Contract Servs. Co., Inc., B-228931, 87-2 CPD ¶ 638. In protest concerning the agency's decision to perform services in-house, the protester argued that its bid price included air conditioning maintenance services but the MEO's cost estimate did not. The GAO sustained the protest, finding that the solicitation expressly required the air conditioning work.
- ⇒ DynCorp, B-233727.2, 89-1 CPD ¶ 543. The GAO sustained the protest because the agency failed to include all phase-in costs (such as recruiting and training) in its in-house estimate and included a "plans analysis"

instead of a “budget manager” in its staffing plan as required by the solicitation.

⇒ Aspen Sys. Corp., B-228590, 88-1 CPD ¶ 166. The GAO sustained protest where the agency required only the contractor to provide a “project manager.”

C. Once bids are opened, the agency is required to award the contract to the lowest responsive bidder unless “compelling reasons” to reject all bids exist.

⇒ RCA Serv. Co., B-208204.2, 83-1 CPD ¶ 435. The agency canceled the solicitation after the administrative appeal board agreed with the protester that the agency failed to consider a reduction in scope of work in estimating the cost of in-house performance. The protester brought action to the GAO, and the GAO held that the cancellation was unjustified because the agency simply could have adjusted its in-house estimate to account for the scope reduction.

⇒ Satellite Servs., Inc., B-207180, 82-2 CPD ¶ 474. Upon appeal of the agency’s decision to perform in-house, the administrative board ruled that the solicitation contained inadequate and ambiguous specifications regarding holiday service requirements and recommended cancellation of the IFB and a resolicitation that accurately reflected the agency’s needs. The protester—the only private offeror in the competition—protested to the GAO, arguing that the solicitation was clear, and that it would have received the award if the agency conducted the cost comparison properly. The GAO agreed, ruling that the cancellation was unjustified.

## **COST AND STAFFING ISSUES**

A. The agency is required to follow cost comparison guidelines when calculating labor costs.

⇒ Pam Am World Servs., Inc., B-215829, 85-1 CPD ¶ 712. Although the solicitation had been amended to incorporate revised cost comparison guidelines, the agency failed to use those guidelines when converting performance hours to full-time equivalents. As a result of using wrong cost comparison data, the agency had incorrectly concluded that continued performance in-house would be more economical.

⇒ Holmes & Narver Servs., Inc., B-212191, 83-2 CPD ¶ 585. The agency failed to consider proper wage board rates and thus had not estimated its in-house labor costs in accordance with the A-76 Supplemental Handbook.

- B. The MEO and contractor may be subject to differing legal obligations, causing a cost disadvantage for the contractor vis-à-vis the MEO.
- ⇒ SMC Informational Sys., B-225815, 87-1 CPD ¶ 552. The contractor was subject to payment deductions for defective performance while the Government was not. The GAO held that there was no requirement that the A-76 cost comparison must equalize inherent disparities.
  - ⇒ Inter-Con Security Sys., Inc., B-257360.3, 94-2 CPD ¶ 187. The Government's wage rates were significantly less than the wage rates required to be paid by private contractors pursuant to the Service Contract Act. The GAO held that the fact that federal employees are not subject to the Service Contract Act and applicable wage determinations did not constitute a legally impermissible competitive advantage for the Government.
- C. The GAO has ruled that the Government need not include labor costs for staff performing Governmental functions when estimating the costs of in-house performance.
- ⇒ Raytheon Support Servs., Co., B-228352, 88-1 CPD ¶ 44. The protester argued that the Government failed to include in its cost estimate the cost of eight staff positions that were set out in the MEO's proposed organizational chart. The GAO rejected the argument, stating that the eight individuals filling those positions would be performing government functions rather than work included in the performance work statement.
  - ⇒ Trend Western Tech. Corp., B-221352, 86-1 CPD ¶ 437. Protest was denied where the Government's proposed table of organization included six staff positions that were not included in the Government's cost estimate but that were specifically allocated as performing government functions.
- D. The GAO generally will not question the Government's own estimate of the number of employees it believes are necessary to perform the tasks in the performance work statement.
- ⇒ Bay Tankers, Inc., B-230794, 88-2 CPD ¶ 18. The GAO stated that it will not question an agency determination of the staffing level required to accomplish a performance work statement where the record does not show that the determination was made in a manner tantamount to fraud or bad faith. The protester argued that historical preventive maintenance records established that the MEO did not allocate sufficient labor. The GAO rejected this argument, stating that there was no basis to conclude

that the Government was required to compute its staffing solely on historical workload data without consideration of recommended management efficiencies.

⇒ Dwain Fletcher Co., B-219580, 85-2 CPD ¶ 348. The protester argued that the agency did not have adequate staffing to accomplish certain areas of work contained in the performance work statement and that this inadequacy resulted in an understated in-house cost estimate. The GAO dismissed the protest, stating that the agency should be free to make its own management decisions on staffing levels so long as they are not made fraudulently or in bad faith.

E. The GAO will assess whether the agency's estimated staffing is consistent with the management plan.

⇒ Dynateria, Inc., B-221089, 86-1 CPD ¶ 302. The GAO sustained the protest where the agency's management study stated that four individuals accounting for four FTEs were required for managing a government facility, but the agency assigned only .15 FTEs for each of the four individuals for a total of .60 FTEs.

## **PROTEST REMEDIES**

A. Where the protest is sustained, the GAO usually recommends that the agency correct the specified errors and award the contract or decide to perform in-house accordingly. The GAO might also award the protester its costs incurred in filing the protest.

⇒ DynCorp, B-233727.2, 89-1 CPD ¶ 543. Agency failed to include all costs in its in-house estimate. The GAO recommended that the agency revise its estimate to account for those costs and award the contract to the protester if its bid was found lower. In addition, the GAO held that the protester was entitled to the costs of filing and pursuing the protest.

B. The GAO has, however, given the agency the option of simply paying the protester's B&P and protest costs.

⇒ Aspen Sys. Corp., B-228590, 88-1 CPD ¶ 166. The GAO concluded that the agency improperly either excluded the cost of a project manager from its cost estimate or led the protester into including this cost and overstating its cost of performing. The GAO recommended that the agency revise its cost comparison and, if appropriate, award the contract to the protester based on its lower proposed cost. But, if the contract is not awarded, the protester would be entitled to reimbursement of its proposal preparation and protest costs.

C. The GAO has recommended award to the private offeror where correction of the agency's error would result in the private offeror's bid being lower than the MEO's cost estimate.

⇒ Contract Servs. Co., Inc., B-228931, 87-2 CPD ¶ 638. In a protest against the agency's decision to perform services in-house, the protester argued that its bid price included air conditioning maintenance services whereas the agency's cost estimate did not. The GAO sustained the protest finding that the solicitation contained language expressly calling for the air conditioning work, and ruled that eliminating the amount attributable to the disputed work from the contractor's bid would result in a contractor price less than the Government's in-house cost estimate. The GAO recommended that a contract for the remaining work be awarded to the protester.

D. Where the agency has improperly canceled a solicitation, the GAO has recommended that the agency reinstate the solicitation and complete the cost comparison in accordance with the proper procedures.

⇒ RCA Serv. Co., B-208204.2, 83-1 CPD ¶ 435. The agency canceled a solicitation after the agency's initial decision to contract in-house was appealed to the Army Administrative Appeal Board. The board had ruled that the agency failed to consider a reduction in scope of work in the government's in-house cost estimate. The protester brought action to the GAO. The GAO held that the cancellation was unjustified and that the agency should complete the cost comparison while simply adjusting its in-house estimate to account for the scope reduction.

⇒ Satellite Servs., Inc., B-207180, 82-2 CPD ¶ 474. The GAO recommended that the solicitation be reinstated and that, consistent with historical records, the agency adjust its in-house estimate to include a proper amount of holiday premium pay.

## **II. GAO DECISIONS CONCERNING PUBLIC/PRIVATE COMPETITIONS NOT INVOLVING CIRCULAR A-76**

A. The GAO will review solicitations that combine multiple requirements to determine whether the agency's approach is reasonably required to satisfy the agency's needs.

⇒ Pemco Aeroplex, Inc., B-280397, 1998 WL 667596 (Sept. 25, 1998). The protest concerned the Air Force's consolidation at McClellan AFB of workload requirements in the following areas: (1) programmed depot

maintenance of KC-135 aircraft; (2) inspections and painting of A-10 aircraft; and overhaul and repair requirements for (3) hydraulic components; (4) electrical accessories; and (5) flight instruments/electronics. Pemco asserted that it was a potential offeror for the KC-135 workload but that the solicitation unduly restricted competition by combining requirements in one procurement. The Air Force argued that the workload consolidation was necessary due to concerns about readiness, adequate competition for all of the workload, maintaining and promoting efficiency and economy in production operations, schedule constraints, and staffing resources. The GAO sustained the protest, ruling that none of these reasons were sufficiently supported to show that the consolidation was reasonably necessary to meet the Air Force's needs. The GAO recommended that the Air Force cancel the solicitation and resolicit its requirements without bundling the workloads, and consider using a single solicitation to permit competitors to offer any combination of the five workloads. [The Air Force elected not to follow the GAO's recommendation and went ahead with awarding the work to a team led by Boeing and Ogden AFB. A complaint filed by Pemco contesting the Air Force's action is pending in a U.S. district court in Alabama.]

⇒ National Airmotive Corp., B-280194, 1998 WL 637016 (Sept. 4, 1998). In a protest concerning the Air Force's competition at Kelly AFB, a private offeror argued that the bundling of depot maintenance and repair requirements for T-56, TF-39, and F-100 aircraft unduly restricted competition. The Air Force argued that the consolidation of these workloads was necessary because of readiness concerns. The GAO denied the protest, holding that, in the context of the degraded readiness status of the engine spares required for the aircraft, it found that the Air Force's concerns regarding readiness were reasonable. More specifically, the GAO ruled that the agency provided a documented basis for concluding that transitioning to multiple contractors would create a greater risk of decreased productivity than the transitioning to a single contractor. The workloads have significant common processes, and transitioning the workloads in a manner consistent with the manner in which the workloads were currently performed would reduce the risk of productivity declines that could occur if the Air Force were to administer multiple contracts for individual workloads with its diminishing personnel resources.

- B. GAO has held that 10 U.S.C. § 2208(j), which permits subcontracting by Army arsenals, applies only where DoD activities can compete under the solicitation as prime contractors.

⇒ Lewis Machine & Tool Co., B-272069, 96-2 CPD ¶ 108. The agency eliminated the protester from the competition for a contract involving the development of a lightweight 155 millimeter howitzer. The solicitation contemplated the purchase of the howitzer from private industry, and did not contemplate that arsenals could compete with private firms for the contracts. The agency, however, subsequently amended the solicitation to add a provision permitting commercial sources to subcontract with DoD activities pursuant to 10 U.S.C. § 2208(j). The GAO held that, notwithstanding the inclusion in the solicitation of a provision expressly allowing for subcontracting with DoD activities pursuant to 10 U.S.C. § 2208(j), the arsenal's subcontract with the protester was not authorized by that statute. 10 U.S.C. § 2208 provides:

The Secretary of a military department may authorize a working capital funded industrial facility of that department to manufacture . . . articles and sell these articles, as well as manufacturing or remanufacturing services provided by such facilities, to persons outside the [DoD] if--

- (1) the person purchasing the article or service is fulfilling a [DoD] contract; and
- (2) the [DoD] solicitation for such contract is open to competition between [DoD] activities and private firms.

The GAO held that the plain language of the statute precluded the Army from opening the competition to DoD activities for subcontracting since the solicitation was not open to competition between DoD activities and private firms for the prime contract.

C. GAO has held that because the Government must pay for any cost overruns incurred by a public entity, an offer submitted by a public entity should include a cost realism analysis.

⇒ Sargent Controls & Aerospace, B-254976, 94-1 CPD ¶ 66. The solicitation stated that the agency would analyze the apparent successful offer to determine whether the proposal reflected a realistic estimate of the total price required to complete the work. The GAO held that it was improper to exclude a private offeror's proposal from the competitive range on the basis of the price differential between its bid and a public depot where the agency failed to consider whether the depot's proposal was realistically priced.

⇒ Newport News Shipbuilding and Dry Dock Co., B-221888, 86-2 CPD ¶ 23. The solicitation required offerors to propose on a fixed-price, incentive

basis. The protester argued that the fixed-price, incentive concept of a ceiling price was meaningless to a public entity because the public entity is under no contractually enforceable risk and, thus, the agency must perform a cost realism analysis. The GAO sustained the protest, holding that the agency was required to review the reasonableness of the public entity's cost elements but failed to do so.

D. GAO has held that the solicitation does not have to level the playing field to account for inherent advantages.

⇒ Ryder Aviall, Inc., B-249920, 1992 WL 395681. The protester argued that the solicitation's requirement that offerors price contractor-furnished parts on a total fixed-priced basis was unfair because public offerors would, in effect, be offering such parts on a cost-reimbursement basis. The parts needed to be supplied were not fixed, but rather would vary from engine to engine during the overhaul process. The GAO held that the statute applicable to the procurement (DoD Appropriations Act for FY92) did not mandate that each element of a public/private competition be equalized by reducing risks which may pertain to firms in the private sector

E. The GAO has overturned an award to a public depot and recommended award to the commercial source where the DCAA had found that the depot's costs had been underestimated by a significant amount. See Canadian Commercial Corp./Heroux, Inc., B-253278, 93-2 CPD ¶ 144, aff'd, Department of Air Force, B-253278.3, 94-1 CPD ¶ 247.

### **III. FEDERAL COURT DECISIONS CONCERNING OMB CIRCULAR A-76**

#### **PROCEDURAL HURDLES**

A. Plaintiffs must show "injury in fact."

⇒ CC Distributors, Inc. v. United States, 883 F.2d 146 (D.C. Circuit 1989). Contractor argued that the agency violated the law by discontinuing contracts for contractor operated civil engineer supply stores without first undertaking cost comparison studies to evaluate the merits of private contractor performance as against in-house performance. The court ruled that the contractor's loss of opportunity to compete for the contracts was "injury" for purposes of standing, even though contractors had no right to the contract under the program, and even though the agency invoked no procurement process when allowing the contracts to expire.

B. Plaintiffs must overcome the “Zone of Interest” prudential standing requirement.

- ⇒ National Fed’n of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Circuit 1989). Union contested agency decision to contract out to private contractors services formerly provided by government employees. The agency argued that the union was not in the zone of interest of a relevant statute. The court stated that Circular A-76 in itself could not grant standing because it was not a statute, but the court reviewed the Budget and Accounting Act of 1921 and the Office of Federal Procurement Policy (“OFPP”) Act Amendments of 1979, which Circular A-76 cites for authority. The court found nothing in the 1921 Act or its legislative history indicating that Congress contemplated federal employees or their unions as a class of plaintiff. As to the OFPP Act Amendments, the court concluded that because the legislative history of the OFPP Act Amendments endorsed the policy of reliance on the private sector, “it is difficult to conclude anything but that the interests of federal employees are inconsistent with the purposes of [the amendments].” (In addition, the court concluded that the union lacked disappointed bidder standing because it had not submitted a bid on the solicitation.)
- ⇒ National Air Traffic Controllers Ass’n, MEBA, AFL-CIO v. Peña, 1996 WL 102421 (6th Cir. 1996) (unpublished). The National Air Traffic Controller Association sought injunctive and declaratory relief to prevent the FAA from privatizing air traffic control responsibilities at Level 1 air traffic control towers. The FAA sought to dismiss the suit, arguing that the union did not come within the zone of interest of any relevant statute. In addressing the argument, the Sixth Circuit agreed that Circular A-76 could not in itself be the basis for standing because it was not a statute. The Sixth Circuit found, however, that the policies of Circular A-76 were reflected in the OFPP Act Amendments of 1979. In reviewing the legislative history of those amendments, the court ruled that the amendments sought to preserve government functions that are so inherently government that they should not be privatized. Thus, because the union argued that the air traffic control positions were inherently government positions, the court ruled that the action met the zone of interest test. The court distinguished its case from National Fed’n of Fed. Employees on the basis that the employees in National Fed’n of Fed. Employees did not argue that the positions in question were inherently governmental, but rather that the agency had erred in its cost comparison calculation resulting in a loss of federal employee jobs.
- ⇒ CC Distributors, Inc. v. United States, 883 F.2d 146 (D.C. Circuit 1989). The court held that the private contractor was within the zone of interest

of Section 1223 of the National Defense Authorization Act for Fiscal Year 1987, which stated that “[e]xcept as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to . . . the Department of Defense (other than functions which . . . must be performed by military or government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower . . . .” [Similar wording is now codified at 10 U.S.C. § 2462.]

C. Some courts have held that the Government’s decision to outsource is a discretionary agency function that is not reviewable.

⇒ American Fed’n of Gov’t Employees v. Brown, 680 F.2d 722 (11th Cir. 1982). The court declined to review the agency’s contracting out decision because it found that Circular A-76 failed to provide meaningful criteria against which a court may analyze the agency’s decision and because the contracting out decision involved military and managerial choices inherently unsuitable for the judiciary to consider.

⇒ Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979). The court held that Circular A-76 failed to provide meaningful criteria against which a court may analyze a contracting-out decision.

⇒ CC Distributors, Inc. v. United States, 883 F.2d 146 (D.C. Circuit 1989). The court relied upon the Commercial Activities Program regulations located at 10 C.F.R. Part 169 in holding that sufficient guidance existed upon which to evaluate the agency’s decision to convert an activity to in-house performance.

D. The Court of Federal Claims has reviewed protests regarding the agency’s rejection of a private offeror’s proposal.

⇒ CACI Field Servs., Inc. v. United States, 13 Cl. Ct. 718 (1987). The agency canceled the solicitation after it had concluded that no offeror had submitted a technically acceptable proposal. One disappointed offeror protested to the United States Claims Court [now the Court of Federal Claims] which then reviewed the merits of its arguments but ultimately denied the protest.

## **MERITS**

A. In a case where the Sixth Circuit asserted jurisdiction over a federal employee union’s bid protest, the court held that the agency must follow Circular A-76 before outsourcing work to the private sector.

⇒ National Air Traffic Controllers Ass’n, MEBA, AFL-CIO v. Secretary of the Dep’t of Trans, 997 F. Supp. 874 (N.D. Ohio 1998). Union challenged FAA’s decision to privatize Level 1 air traffic control towers, arguing that the FAA failed to conduct a cost comparison under Circular A-76. The court held for the union, ruling that the FAA did not perform the required comparison and, even if the FAA had waived the cost comparison, it did so improperly because OMB Circular A-76 and its Supplement state that an agency may not waive a cost-comparison study until the agency has determined that the function is not inherently governmental. The court “vacate[d] the FAA’s privatization program for FAA-operated Level 1 towers” and remanded the case to the FAA to undergo the proper cost study analysis required by Circular A-76.

B. A tentative award may be rescinded if there is a reasonable basis for doing so.

⇒ Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330 (D.D.C. 1985). The protester received a tentative award under Circular A-76 competition. After award, the agency found that the solicitation failed to include a Service Contract Act requirement. The agency rescinded the tentative award, amended the solicitation, and requested that offerors submit revised BAFOs. The protester sought injunctive and declaratory relief to prevent any rebidding of the RFP. The court denied the protest because the protester did not have an enforceable contract but rather a tentative contract award that was subject to an administrative appeal process.

⇒ Arrowhead Metals, Ltd v. United States, 8 Cl. Ct. 703 (1985). The agency canceled the solicitation after the opening of sealed bids where low bidder on contract for processing and fabrication of U.S. Mint coinage blanks was a foreign contractor. The court held that the agency acted rationally in that the cancellation was based on reconsidering whether the function was inherently governmental.

## **EMERGING ISSUES**

A. Does the Administrative Dispute Resolution Act of 1996 (“ADRA”), Pub. Law No. 104-320, which amended the Tucker Act, 28 U.S.C. § 1491, provide a new basis for federal courts to review agency decisions to outsource or perform in-house?

⇒ ADRA, codified at 28 U.S.C. § 1491(b)(1), provides as follows:

Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an *interested party* objecting to a

solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a *proposed procurement*. . . .

(Emphasis added.)

⇒ Arguably, ADRA is only a jurisdictional statute and thus does not affect the “standing” and “reviewability” holdings by the courts under the prior statutory framework. Moreover, with respect to federal employee unions, they arguably are not “interested parties” to bring a bid protest. Although the statute does not define the term “interested party,” the Court of Federal Claims on some occasions has followed the definition of “interested party” set forth in GAO’s jurisdictional statute. The GAO does not review protests by federal employee unions.

⇒ On the other hand, it may be argued that by expressly granting jurisdiction over procurement-related actions—including actions related to “proposed” procurements—Congress must have intended that the courts review such actions, including actions involving proposed contracting-out decisions. With respect to federal employee unions, they might argue that the definition of “interested party” set forth in the Federal Activities Inventory Reform Act (includes federal employee unions as interested parties) should be followed instead of the GAO definition.

B. Does the Federal Activities Inventory Reform Act of 1998 (“FAIR”), Pub. Law No. 105-270, change prior case law?

⇒ The FAIR requires each executive agency to annually submit to OMB a list of activities performed by federal government employees that are not inherently governmental. An “interested party” may challenge the inclusion or exclusion of an activity on the list to an executive agency. The initial decision may be appealed to the head of the agency. In addition to actual or prospective offerors, the term “interested party” includes federal employee unions and private sector professional associations.

⇒ The FAIR does not expressly provide for judicial review of the contents of the inventory list; however, it may reasonably be argued that an interested party could bring a federal district court action under the Administrative Procedure Act after the party has exhausted the administrative process. Nevertheless, the court might conclude that the

decision is unreviewable because it is committed to agency discretion by law.

- ⇒ With respect to existing case law regarding standing and reviewability, the FAIR might not have much of an effect. The FAIR may even provide a larger barrier for federal employee unions who wait until a solicitation is issued to claim that a function is inherently governmental. In that case, the Government might argue that the union has waived the issue because it failed to timely object to the inclusion of the function on the agency's inventory list in accordance with the FAIR.
  
- ⇒ Defense contractors might argue that the fact that a function is on the agency's inventory list mandates that the function be subject to a cost comparison. Section 2462 of Title 10 requires that DoD procure "each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a [lower] cost . . . ." Because those functions on the inventory list have been determined not to be inherently governmental, they arguably should be performed by a source in the private sector if such source can provide the supply or service at a lower cost.