

# Cases Interpreting the Provisions of OMB Circular A-76

## Federal Court Cases 1993-2001

American Federation of Government Employees (AFGE) v. United States, 258 F.3d 1294, CAFC No. 00-5090, July 23, 2001.

- The Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of Federal Claims (COFC) decision that the American Federation of Government Employees (AFGE) does not have standing to sue the United States for allegedly not properly conducting an OMB Circular A-76 cost comparison. The CAFC held that the plaintiffs lacked standing because they were not actual or prospective bidders or offerors.

American Federation of Government Employees (AFGE) v. United States, 2001 U.S. Dist. LEXIS 4044 (W.D. 2001)

- The court held plaintiff lacked standing to sue the Air Force for allegedly violating its own regulations and instructions, in particular Office of Management and Budget (OMB) Circular A-76, because A-76 cannot create enforceable rights in third parties. OMB Circular A-76 is not a statute and cannot form a basis for standing. Federal employees are not within the “zone of interests” intended to be protected by A-76.

American Federation of Government Employees (AFGE) v. Major General George T. Babbitt, Air Force Materiel Command, et al., 2001 U.S. Dist. LEXIS 5426 (S.D. 2001)

- Defendant’s motion to dismiss plaintiff’s claim of failure to follow OMB Circular A-76 when contracting out was granted for lack of standing. The court concluded that the plaintiffs lacked the requisite standing because they 1) relied on OMB Circular A-76 to satisfy the prudential standing requirements, 2) fell outside the “zone of interests” protected or regulated by the various statutes, 3) asserted a generalized grievance which is insufficient to establish standing, and 4) the plaintiff (AFGE) lacked “associational standing” because the individual plaintiffs lacked standing.

Moore v. United States Navy, 2001 U.S. Dist. LEXIS 4469 (N.D. Fl. 2001)

- Plaintiff's motion for preliminary injunction against defendant for expending funds on a commercial activities study in violation of federal law and Department of Defense Regulations, OMB Circular A-76, was denied because plaintiff lacked standing and ripeness. The court held plaintiff did not have an injury in fact to create standing and there was no binding and conclusive administrative decision to be reviewed so the issue was not ripe.

Rust Constructors v. The United States, 2001 U.S. Claims LEXIS 92 (Cl. Ct. 2001)

- The court held the Government is not required to perform a "best value" comparison between the Government's in-house offer and the successful private sector offer when conducting an A-76 Study. The Government is only required to compare the in-house offer with the private sector offer to determine that they are offering the same level and quality of performance. The court denied plaintiff's motion for summary judgment and granted defendant's cross-motion for judgment upon the administrative record.

American Federation of Government Employees (AFGE) v. United States, 104 F. Supp. 2d 58 (D.C. 2000)

- Plaintiff's motion for preliminary injunction against the Air Force for suspending the OMB Circular A-76 process was denied and the Air Force decided to award the contract to a Native-American firm as outlined under Pub. L. No. 106-79, § 8014, which contains a preference for award to Native American firms. The plaintiffs alleged that the award violated the equal protection clause under the 5<sup>th</sup> Amendment. The motion was denied because the plaintiffs failed to meet the burden of justifying the extraordinary remedy of a preliminary injunction. Additionally, the plaintiffs lacked standing concerning one of the allegations.

American Federation of Government Employees (AFGE) v. William J. Clinton, President of the United States, et al., 180 F.3d 727 (6<sup>th</sup> Cir. 1999).

- Plaintiffs AFGE and present and former Government employees, appealed the United States District Court for the Southern District of Ohio's decision dismissing their claim for lack of standing. The U.S. Court of Appeals for the 6<sup>th</sup> Circuit affirmed the dismissal. The court held that the plaintiffs' asserted injuries were too speculative, and insufficiently concrete and particularized to establish Article III standing.

Inter-Con Security Systems v. Secretary of the Air Force, 1994 U.S. Dist. LEXIS 10995 (N.D. CA 1994)

- Plaintiff filed a timely bid protest against defendant Air Force after defendant concluded through an OMB Circular A-76 study that the contract should remain in-house. Under the Competition in Contracting Act (CICA) the defendant was precluded from awarding a contract if a timely bid protest was filed with the General Accounting Office (GAO). The court held that the CICA stay provision did apply because defendant's decision to retain the work in-house was the equivalent of a contract award. Accordingly, plaintiff's motion for an injunction was granted.

U.S. Department of the Treasury v. Federal Labor Relations Authority, 996 F.2d 1246 (D.C. Cir. 1993)

- When a Government-wide regulation under § 7117(a) of OMB Circular A-76 is itself the only basis for a union grievance, the regulation precludes bargaining over its implementation and prohibits grievances concerning alleged violations. The Federal Labor Relations Authority may not require a Government agency to bargain over grievance procedures directed at implementation of the regulation. The court denied enforcement of the defendant's order to negotiate.

## **Comptroller General 1993 – 2001**

TDF Corporation, B-288392, (October 23, 2001)

- The Department of the Army (DA), pursuant to the provisions of OMB Circular A-76, issued a solicitation in order to select a private contractor to compete with the agency's Most Efficient Organization (MEO). The agency performed a preliminary evaluation of TDF's proposal and concluded it contained several deficiencies. Though the proposal was deemed inadequate, the agency told TDF it would be included in the competitive range, but that the proposal could be removed from the competitive range if the defects were not resolved. TDF made revisions and additions to the proposal but the Source Selection Authority (SSA) determined that TDF's proposal would no longer be considered.
- TDF, in turn, filed this protest alleging it was unreasonable for the agency to exclude its proposal from consideration because the agency failed to properly apply the evaluation factors stated in the solicitation. TDF also contends that elimination of its proposal was improper due to an alleged conflict of interest on the part of two members of the nine-member evaluation team who held positions in the function under study. The agency responded by saying that the two positions in question were deemed "Government in nature" and, therefore, these positions were not subject to being contracted out. The Comptroller General did not sustain the protest because it found no merit to TDF's contentions and held

no conflict of interest existed because the positions were not directly affected because they were not in jeopardy of being contracted out.

COBRO Corporation, B-287578.2, (October 15, 2001)

- COBRO alleged that the Army Materiel Command's (AMC's) RFP improperly required private-sector offerors to propose their own facilities to physically store inventory and maintain newly acquired equipment, rather than using existing and available Government facilities. In addition, COBRO alleged that AMC did not properly account for the comparable costs under the MEO associated with the facility provision in the private sector proposals. COBRO challenged AMC's decision to keep the work in-house because it believed the cost comparison was inadequate. The Comptroller General stated that "to preserve the integrity of the A-76 cost comparison, private-sector offerors and the Government must compete on the same scope of work." The Comptroller General decided that there was no basis for AMC not to make existing Government facilities available to offerors and recommended that AMC prepare a new RFP for private sector competition making the Government facilities available.

DynCorp Technical Services LLC, B-284833.3, (July 17, 2001)

- The Comptroller General sustained DynCorp's protest over the Air Force's decision to retain in-house rather than contract out performance of base operations at Maxwell Air Force Base and Gunter Annex. The Air Force's decision to retain the services in house was a result of a cost comparison pursuant to OMB Circular A-76.

Lackland 21<sup>st</sup> Century Services Consolidated, B-285938.6, 2001 U.S. Comp. Gen. LEXIS 108 (July 13, 2001)

- The Comptroller General dismissed Lackland 21<sup>st</sup>'s (L-21's) request to reinstate its protest concerning the Air Force's decision that it would be more economical to perform base operations in-house rather than contract out to L-21, because the Comptroller General said it was rendered academic when the Air Force conceded its decision was improper and it intended to award L-21 the contract. Additionally, the Comptroller General stated that it does not reinstate protests; a protest "once academic is not "revived" by subsequent agency action," it just gives rise to a new basis for protest. The Comptroller General also dismissed L-21's request for reimbursement of protest costs based on the agency's failure to properly implement the corrective action it promised, because it held it was reasonable for the Air Force to await the conclusion of the Inspector General's review before awarding the contract to L-21.

Johnson Controls World Services, Inc., B-286714.2, 2001 CPD ¶ P20 (2001)

- The Comptroller General sustained Johnson Controls' protest claiming that DA's award of a contract to IT Corporation created an organizational conflict of interest (OCI) and, therefore, the award was improper. The Comptroller General concluded that an OCI did exist because IT Corp's subcontractor (INNOLOG) was under another contract with the Army and accordingly, IT should have been excluded from competing. The Comptroller General recommended that the Army review the apparent OCI and consider if it could feasibly be avoided and if not the Army should terminate the contract with IT Corp.

LBM, Inc., B-286271 (December 1, 2000)

- The Comptroller General denied LBM's protest concerning its allegation that the agency's solicitation requirement was inappropriate in that it was overly restrictive of competition and exceeded the agency's actual needs. The Comptroller General found that the agency's solicitation requirement was reasonable. However, in dicta, the Comptroller General did find that the agency's requirement that the offeror must obtain certification prior to submitting a proposal would unreasonably exclude potential offerors. The Comptroller General said competition would be stifled especially in the context of an A-76 cost comparison, "where the time between submission of proposals and actual commencement of the contract activities may be substantial."

N&N Travel & Tours, Inc., B-285164.2, 2000 U.S. Comp. Gen. LEXIS 128 (2000)

- The Comptroller General sustained N&N's protest concerning the issuance of the Air Force's solicitation for an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract because the Air Force improperly included an in-house bidder when they were required through Department of Defense (DoD) regulations to reserve this solicitation for small business bids. N&N claimed the Air Force violated OMB Circular A-76 by converting travel management services from a contracted-out activity to an in-house activity. The Comptroller General agreed with N&N because the Air Force did not clearly state it was using the General Services Administration (GSA) to procure services, therefore, bidders correctly assumed that the Air Force would follow DoD procedures.

Symvionics, Inc., B-281199.2 (March 4, 1999)

- The Comptroller General denied Symvionics' protest concerning the Air Force's decision to retain housing management functions in house, rather than contracting for those services. Symvionics alleged in its protest that the Air Force failed to seal its management plan/most efficient organization (MP/MEO) prior to Symvionics' proposal submission, which was contrary to OMB Circular A-76 guidelines. In addition, Symvionics alleged that the Air Force failed to specifically allocate replacement hours or to describe in detail how replacement personnel would handle tasks previously proposed for volunteers. The Comptroller General stated that the Air Force's failure to seal the MEO prior to Symvionics' submission of its proposal did not materially affect the cost comparison because the MP had already been approved. With regard to Symvionics' second claim, the Comptroller General held that the number of personnel and labor hours is more than sufficient to cover volunteer effort and to meet all performance work statement responsibilities. Therefore, the Comptroller General denied Symvionics' protest.

DZS/Baker L.L.C. & Morrison Knudsen Corporation, B-281224 (January 12, 1999)

- The Comptroller General sustained DZS/Baker L.L.C. and Morrison Knudsen Corporation's ("DZS") protest of the Air Force's decision to retain operations in-house under an OMB Circular A-76 evaluation as invalid because of the existence of a conflict of interest. The Comptroller General held that because the team evaluating the proposals submitted under the A-76 process consisted of a large number of agency evaluators that held positions under the study and were thus subject to being contracted out, a conflict of interest was created. This significant conflict of interest on the part of the agency evaluators rendered the decision to retain services in-house invalid and did not provide a proper basis for cancellation of the solicitation. The Comptroller General sustained DZS' protest and recommended that the agency rescind the cancellation, create a new technical evaluation team, and reevaluate the proposals. DZS was also reimbursed for its cost of filing and pursuing the protest.

Southwest Anesthesia Services, B-279176.2, 1998 U.S. Comp. Gen. LEXIS 259 (1998)

- The Comptroller General will not review an agency's decision to perform services in-house, unless there is an allegation of a statutory violation or if the agency issued a solicitation for the purpose of conducting a cost comparison under OMB Circular A-76. The Comptroller General denied Southwest Anesthesia's protest that Indian Health Services improperly cancelled its solicitation to perform the contract in-house because it was trying to avoid awarding the contract to Southwest Anesthesia due to animosity. The Comptroller General held that the agency's decision to perform the contract in-house was reasonable.

Pemco Aeroplex, Inc., Aero Corporation, B-275587.9, 1998 U.S. Comp. Gen. LEXIS 250 (1998)

- The Comptroller General held that a solicitation may be cancelled after a protest is filed as long as the agency has a reasonable basis for doing so. The Comptroller General held that the Air Force had a reasonable basis for canceling its solicitation, in that it would save money and be the best use of the Air Force's capacities and resources.

J & E Associates, B-278187, 1998 U.S. Comp. Gen. LEXIS 34 (1998)

- J & E contends that its proposal was misevaluated under the management plan and past performance factors compared to the evaluation of the awardee's proposal. The Comptroller General denied J & E's protest because the agency's

evaluation of J & E's proposal was reasonable and consistent with the solicitation's evaluation criteria.

Orbital Sciences Corporation, B-254698, 94-1 CPD ¶ P2 (1994)

- Orbital Sciences Corporation (OSC) protests the terms of and Invitation For Bids (IFB) issued by the Department of Commerce alleging that the solicitation was defective because it violated 41 U.S.C. § 253(c) in that the bidders should not have been required to demonstrate, at their own expense prior to award, that their products met all applicable specifications. The Comptroller General denied OSC's protest because when using OMB Circular A-76, the agency's decision to award the contract to another company was reasonable because its bid was lower than OSC's.

Ameriko Maintenance Company, B-253274, 93-2 CPD ¶ P121 (1993)

- The Comptroller General denied Ameriko's protest because it held that the contracting agency properly made a price/technical tradeoff in awarding the contract to the higher priced, higher technically rated offeror. This tradeoff was proper because the record showed it was reasonably based on the awardee's significantly superior rating in the agency's most important areas of evaluation.

Daniels Manufacturing Corporation, B-253637, 93-1 CPD ¶ P439 (1993)

- The Comptroller General dismissed Daniels' protest because the GAO will not review a bid protest challenge to an agency's intention to perform a manufacturing effort in-house instead of contracting with the private sector when no competitive solicitation has been issued for cost comparison purposes under OMB Circular A-76 since such a matter is one of executive branch policy.

BAE Systems, B-287189, 2001 U.S. Comp. Gen. LEXIS 77 (2001)

- The Comptroller General sustained BAE's protest that DA had failed to comply with OMB Circular A-76 requirements. The Comptroller General held that the SSA had failed to consider strengths identified in the private sector offer when comparing it to the in-house offer. In addition, once the SSA became aware that the in-house offer did not meet the requirements of the PWS he had to ensure the in-house offer complied with the PWS prior to the cost comparison. The Comptroller General rejected the protestor's argument that if the in-house offer cannot comply with the PWS requirements it should be rejected holding that it is the agency's obligation to either ensure that the in-house offer is adjusted to satisfy the PWS or if the minimum requirements are relaxed or waived to revise the PWS and allow the private sector offeror to meet the new requirements.

Jones/Hill Joint Venture, B-286194.3, 2001 U.S. Comp. Gen. LEXIS 57 (2001)

- The Comptroller General recommended that Jones/Hill be reimbursed its costs of filing and pursuing its protest because the agency unduly delayed in taking corrective actions in its conduct of an A-76 Study in which it did not comply with the requirements of OMB Circular A-76.

BMAR & Associates, B-281664, 99-1 CPD ¶ P62 (1999)

- The Comptroller General sustained BMAR's protest by concluding that the Air Force's lump sum pricing scheme was inconsistent with the statutory requirement for full and open competition. However, the Comptroller General did agree with the Air Force that a Technical Performance Plan (TPP) is not required by the Government for evaluation under the first step of a two-step sealed bid acquisition to determine whether a private sector or Government in-house bid is preferable.

Aberdeen Technical Services, B-283727.2, 2000 CPD ¶ P46 (2000)

- The Comptroller General held that the Army's in-house cost estimate, computed under the requirements of OMB Circular A-76, was improper because the Army failed to include the full costs for a Program Manager and other key personnel required by the solicitation. The Comptroller General also sustained ATS' protest on the grounds that the Army did not follow OMB Circular A-76 requirements for comparing the "best-value" private sector offer with the Government's MEO.

Trajen, Inc., B-284310, 2000 CPD ¶ P61 (2000)

- The Comptroller General sustained Trajen's protest concluding that the Navy's appeal authority lacked a reasonable basis for reversing the cost comparison determination that contractor performance was more economical than in-house performance. The Agency's appeal authority improperly adjusted Trajen's bid upward concerning such costs as federal income tax adjustment and one-time conversion costs in order to make the in-house bid more desirable. The Comptroller General recommended that the appeal authority review the cost comparison, make the proper adjustments to Trajen's bid and, if appropriate, award the contract to Trajen.

Rice Services, Ltd., B-284997, 2000 CPD ¶ P113 (2000)

- In conducting a "best value" source selection, if the Government identifies "strengths" in the successful private sector offeror's proposal or areas in which it

exceeds the requirements of the PWS, the Government must consider these “strengths” in comparing that proposal with the in-house offer to determine if they are both offering the same level and quality of performance.

Imaging Systems Technology, B-283817.3, 2001 CPD ¶ P2 (2000)

- The Comptroller General did not consider Imaging Systems' allegations regarding the Air Force's failure to comply with OMB Circular A-76 because the circular does not, in and of itself, constitute a valid basis of protest. Without a solicitation, which typically commits the agency to following the Circular provisions in conducting public/private cost comparisons, compliance with OMB Circular A-76 is simply a matter of following executive branch policy.

American Federation of Government Employees (AFGE), B-282904.2, 2000 CPD ¶ P87 (2000)

- The Comptroller General dismissed a protest made by federal employees and the unions representing them, alleging that they would be adversely affected by an agency's decision pursuant to OMB Circular A-76 to contract for work rather than perform it in-house. The protest was dismissed because the Comptroller General determined that AFGE was not an actual or prospective bidder or offeror and, therefore, were not interested parties eligible to maintain a protest at the GAO.

IT Facility Services-Joint Venture, B-285841, 2000 CPD ¶ P177 (2000)

- The Comptroller General denied IT's protest concluding that the Army reasonably rejected IT's proposal and that no conflict of interest existed when four Fort Lee employees served on the Source Selection Evaluation Board (SSEB) because none of them held positions under the study and, therefore, these employees would not be directly affected by the cost comparison as their positions were not in jeopardy. The Comptroller General also rejected IT's protest that the agency's use of a contractor to assist in the preparation of the MEO and the evaluation of private sector offers created a conflict of interest as the contractor used discrete sets of employees to perform different tasks and used a "firewall" to keep confidential the preparation of the MEO and management study.