

WILL THE GAO CONSIDER BID PROTESTS FROM IN-HOUSE ENTITIES IN OMB CIRCULAR A-76 COST COMPETITIONS?

Background. OMB Circular No. A-76, Performance of Commercial Activities, was revised by the Office of Management and Budget (OMB) on 29 May 03. Cost competitions between public sector performance (i.e., the “in-house entity”) and the private sector are now categorized in one of two ways: As standard cost competitions involving 65 or more Full-Time-Equivalents (FTEs), or as streamlined cost competitions involving fewer than 65 FTEs. Standard cost competitions are to be completed within 12 months with a possible extension to 18 months. Streamlined competitions are to be completed within 90 days with a possible extension to 135 days. Because of the shortened timeframe for a streamlined cost competition, agencies possibly may not utilize the procurement process and instead may rely on market surveys and estimates to determine whether public or private sector performance is more economical. In a standard cost competition, either the sealed bid acquisition process under FAR 14 or the negotiated acquisition process under FAR 15 is to be utilized. The agency “tender,” submitted by the in-house entity in a standard cost competition, is required to be compliant with the terms and conditions of the solicitation or RFP.

The revised Circular abolished the previous administrative appeals process and instead established a “contest” procedure governed by FAR 33.103, which is the agency level protest process, for standard cost competitions. No parties are allowed to contest the results of a streamlined cost competition.

Discussion. The revised Circular contemplates an acquisition process for standard cost competitions utilizing the Federal Acquisition Regulations. The General Accounting Office (GAO) published a Notice in the Federal Register seeking comments on several issues related to whether the in-house entities have standing to file bid protests at the GAO.¹ The GAO has consistently held that it lacks authority under the Competition in Contracting Act (CICA) to consider protests by the in-house entities under A-76 studies. GAO case law, e.g., American Fed’n of Gov’t Employees, AFL-CIO et al., B-282904.2, June 7, 2000, 2000 CPD 87 at 3-4, has been that Government employees lack standing as a matter of law to pursue bid protests because they are not “interested parties” within the meaning of the CICA. This holding has struck many observers as unfair. The specific questions raised by the GAO in the June 2003 Federal Register are whether the revisions to the OMB Circular A-76 “affect the standing of an in-house entity to file a bid protest” at the GAO, and, if so, who would have the “representational capacity” to file such a protest on behalf of an in-house entity.

The analysis presented in American Fed’n of Gov’t Employees, AFL-CIO et al. made clear that the in-house entity has no standing to submit bid protests under CICA, and revisions to the Circular do not change or supersede the definition of “interested party” under CICA. Despite the fact that the revised Circular requires a more FAR-like

¹ Federal Register, Volume 68, No. 114, Page 34511 (June 13, 2003).

competition between the in-house tender and the private sector offers, it does not change the CICA to allow for bid protests by the in-house entity.

The GAO does, however, have authority to consider “non-statutory” bid protests.² Under this authority, the GAO and the federal agencies may agree that the GAO will consider bid protests by the in-house entity in an A-76 cost competition. Further, the GAO requested comments in its Federal Register notice as to the best method of making known any decision to consider bid protests from in-house entities. The most preferable avenue would be specific Congressional action to revise the CICA to allow the in-house entity “interested party” status; however, language to this effect failed to make it into the Consolidated Appropriations Act of 2004.³ The next best approach, in my view, would be for the GAO to publish a Notice in the Federal Register of its intent to consider in-house bid protests. That approach would be better than waiting for GAO case law to establish the interested party status of the in-house entities as it would enable practitioners to know in advance the ground rules for cost competitions under the revised Circular.

One GAO case has been filed by an individual employee under the revised Circular. That case is William V. Van Auken, B-293590, 06 Feb 04, and concerns a cost competition conducted by the U.S. Forest Service. The GAO has dismissed this particular protest without prejudice, as Mr. Van Auken has filed an identical protest with the agency. The GAO expressly stated, “...this dismissal should not be read as an indication of how our Office will ultimately resolve that question [of standing of Government employees].” Nor did the GAO reach the issue of whether the exhaustion remedy applies in A-76 cost competitions. After the dismissal of the Van Auken protest, the union for the U.S. Forest Service, the National Federation of Federal Employees, has filed a protest presumably on the same issue.⁴

Establishing who would have the “representational capacity” to protest to the GAO on behalf of the in-house entity is problematic because of the competing and differing interests of the constituent “interested parties.” For example, “directly affected employees,” as defined by the revised Circular, as those “employees whose work is being competed in a streamlined or standard competition.”⁵ The “directly affected employees” often are not the same as the “adversely affected employees,” who are defined as those “who are identified for release from their competitive level...as a direct result of a performance decision resulting from a streamlined or standard competition.”⁶ In other words, the employees who are performing the work under the cost competition study may not be the same employees who ultimately are involuntarily separated if the performance decision is that private sector performance is more economical than continued in-house performance.

² 4 C.F.R. 21.13.

³ P.L. 108-199.

⁴ B-293590.2, with a decision expected by 27 May 04. The NFFE has also filed another bid protest, B-293690, in a Forest Service matter, with a decision due 01 Jun 04. It is unclear whether this second protest is related to A-76.

⁵ OMB Cir. A-76, Rev. 29 May 03, Att. D.

⁶ OMB Cir. A-76, Rev. 29 May 03, Att. D.

The sense that A-76 competitions should be fair with respect to the Government employees has gained strength with the discovery that 500 DoD personnel were released from their positions at the Defense and Accounting Service (DFAS) in Cleveland when a \$30 million error was made in developing the cost of the in-house bid.⁷ Although these employees protested internally within DoD, their claims were denied, and a contract was awarded to the private sector. These 500 employees, whose cost of performance was \$30 million less expensive than the private sector cost, were left without recourse. And instead of “cost savings,” DFAS paid \$30 million more than necessary. In cases such as this, it is not only the “adversely affected employees” who suffer; it is the American taxpayer who suffers as well from having to pay more than necessary for the required services.

Not surprisingly, many in the private sector oppose allowing the in-house entity to protest to the GAO. Among the private sector complaints is that if the in-house entity is allowed to protest the process would take much longer than it does now. What this argument does not acknowledge, though, is that GAO protests involve the same amount of time whether the protest is filed by an in-house entity or by the private sector.

The GAO also requested comments as to whether anyone would be able to file a protest at the GAO concerning a streamlined cost competition, inasmuch as no party is able to file a contest (an agency-level protest) for this type of A-76 cost competition. I believe the answer lies with whether the Federal agency conducting the streamlined cost competition engages the Federal procurement system by the release of a solicitation or RFP. However, because of the extremely short timeframe of a streamlined study, it is unlikely the agency would have time to develop a Performance Work Statement, much less release a solicitation, prepare an agency tender, evaluate offers and the tender, conduct discussions, etc.

Finally, the GAO asks for comments as to whether parties involved in A-76 cost competitions should be required to exhaust the administrative remedy (the contest) before the GAO considers A-76 bid protests. There is no statutory or regulatory basis for the exemption doctrine, and it does not apply to non-A-76 solicitations. Even so, the exemption doctrine should continue for several reasons. Obviously at this point the in-house entity cannot protest before the GAO, and thus the only forum available to the in-house entity (and even then only in the standard cost competitions) is the contest procedure. Because A-76 cost studies are complex, it is incumbent upon the agencies to develop an internal level of expertise to resolve A-76 costing issues. This is inevitably going to be true because not only have the timelines been drastically shortened, but also more responsibility has been placed upon the contracting officer regarding the accuracy of the cost competition calculations and the use of the COMPARE software.

Conclusion. With the authority of 4 CFR § 21.13, the GAO may consider protests filed by the in-house entities in cost competitions conducted under the newly revised OMB Circular A-76. The reason for the GAO to consider the review of protests filed by

⁷ Washington Post, 21 April 2003, page 21.

the in-house entities is because of the essential requirement of fairness. To ensure just results in cost competitions requires a forum where the rights of all parties are safeguarded and respected. The GAO proceedings in such protests would guarantee an independent, impartial forum in which inquiries are made before decisions are rendered. The GAO thus would be able to afford relief to Government employees in those circumstances recommending it; this surely would be an improvement over the previous system where once the administrative appeals rights were exhausted, adversely affected Federal employees had no other forum to seek redress. The best method to achieve this, in the absence of Congressional revision of the CICA, would be for the GAO and the federal agencies to agree prospectively that protests from the in-house entities will be considered as non-statutory protests pursuant to 4 CFR § 21.13.

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