



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Dan Duefrene; Kelley Dull; Brenda Neuerburg; Gabrielle Martin

File: B-293590.2; B-293590.3; B-293883; B-293887; B-293908

Date: April 19, 2004

Susan Tsui Grundman, Esq., National Federation of Federal Employees, for Dan Duefrene, and Martin R. Cohen, Esq., American Federal of Government Employees, for Kelley Dull, Brenda Neuerburg, and Gabrielle Martin, for the protesters.

Stephen M. Sorett, Esq., ReedSmith, for SERCO Management Services, Inc., an intervenor.

Daniel N. Hylton, Esq., Forest Service, John F. Ruoff, Esq., Defense Finance and Accounting Service, and Kathleen Oram, Esq., Equal Employment Opportunity Commission, for the agencies.

Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Notwithstanding May 29, 2003 revisions to Office of Management and Budget Circular A-76, the in-house competitors in public/private competitions conducted under the Circular are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an “interested party” eligible to maintain a protest before the General Accounting Office.

DECISION

This decision addresses the standing of individuals and organizations representing in-house competitors in public/private competitions conducted under Office of Management and Budget (OMB) Circular A-76 to protest agency decisions under the Circular to contract work out to the private sector, rather than to perform the work in-house.

DUEFRENE PROTEST

Dan Duefrene, Regional Vice President for Region 5, Forest Service Council, National Federation of Federal Employees (NFFE), protests the United States

Department of Agriculture's (USDA) decision, pursuant to OMB Circular A-76, that it would be more economical to perform the fleet maintenance services for the Forest Service in the Pacific Southwest region by a contract awarded to SERCO Management Services, Inc. (SERCO) under request for proposals (RFP) No. R5SCO603058, rather than to have the services performed in-house.

The USDA conducted a standard competition under OMB Circular A-76, as revised on May 29, 2003, for these fleet maintenance services. On January 7, 2004, the USDA announced the standard competition performance decision and the contract award to SERCO. On January 20, NFFE, acting through Mr. Duefrene, filed an agency-level protest. On February 10, the USDA advised Mr. Duefrene that NFFE did not have standing as a "directly interested party"¹ to contest the standard competition. USDA Letter to Mr. Duefrene (Feb. 10, 2004). On February 17, NFFE protested the USDA's decision to our Office and challenged the agency's decision to contract out the work. Subsequently, Mr. Duefrene, as the elected representative of a majority of the affected employees, filed a protest with the USDA. On March 24, the USDA dismissed and denied the agency-level protest filed by Mr. Duefrene as the elected representative of the majority of the affected employees. On April 2, Mr. Duefrene filed a protest with our Office essentially appealing the USDA's March 24 decision. Thus, Mr. Duefrene, acting both as NFFE's representative and as the "directly interested party" representing a majority of the directly affected employees, protests the USDA's standard competition performance decision.

Regarding Mr. Duefrene's protests, the USDA and SERCO argue that Mr. Duefrene and NFFE lack standing to protest the agency's contract award to SERCO because neither is an interested party under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000). NFFE primarily argues that based on the changes to the revised Circular, the employees affected by the decision to contract out the work meet the CICA definition of an interested party and that NFFE is the statutory representative designated by the majority of these employees directly affected by the agency's decision. In addition, NFFE argues that Mr. Duefrene is the directly interested party as defined under the revised Circular because he specifically was appointed by the majority of the affected employees to

¹ The revised Circular (May 29, 2003) provides that "a directly interested party" may contest certain enumerated agency actions "taken in connection with the standard competition." Revised Circular, attach. B, ¶ F.1. The revised Circular further provides that "the pursuit of a contest by a directly interested party and the resolution of such contest by the agency shall be governed by the procedures of FAR [Federal Acquisition Regulation] Subpart 33.103." *Id.* FAR § 33.103 provides the procedures for filing and resolving agency-level protests.

be their representative. Protest, Apr. 1, 2004, at 3. As discussed below, we conclude that there is no statutory basis for an in-house entity to file a protest at the General Accounting Office (GAO).

Our Office's statutory authority to hear bid protests is found in CICA, which establishes the standard for standing to file a protest by allowing a protest to be filed only by an "interested party" with respect to a contract or a solicitation or other request for offers, and then defines an "interested party" 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). See also Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2004). Under this definition of "interested party," we have heard bid protests filed by private-sector firms that participated in cost comparisons under the Circular that preceded the May 29, 2003 revision, since a private firm participating in an A-76 competition is "an actual . . . offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

In contrast, we have consistently found that federal employees and their unions could not protest any aspect of an A-76 cost comparison under the prior Circular. We concluded that they did not meet CICA's definition of an "interested party" and, therefore, as a matter of law, we lacked authority to consider their protests. In American Fed'n of Gov't Employees et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 3-4, we identified a number of reasons for this conclusion. We pointed out that neither individual federal employees, nor the in-house plan (the "Most Efficient Organization" or MEO), nor the employees' union representatives was an offeror. In addition, we found that the MEO plan submitted in an A-76 cost comparison under the prior Circular was not an offer as defined under the Federal Acquisition Regulation (FAR) because the MEO was not responding to a solicitation (under the prior Circular, the solicitation applied only to private-sector competitors), nor would the MEO, if adopted, lead to the formation of a contract, which is a mutually binding legal relationship to perform the services. Indeed, as we pointed out, no contract is awarded where the MEO prevails in the cost comparison. See also American Fed'n of Gov't Employees, B-223323, June 18, 1986, 86-1 CPD ¶ 572; American Fed'n of Gov't Employees--Recon., B-219590.3, May 6, 1986, 86-1 CPD ¶ 436 (affirming an earlier dismissal). Consistent with our view, the Court of Appeals for the Federal Circuit has also found that federal employees and their unions do not qualify as interested parties to protest a decision made under the prior Circular. American Fed'n of Gov't Employees v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

On May 29, 2003, OMB issued a revised Circular A-76, which changes A-76 competitions to reflect a FAR-based process and which applies to the competitions at issue here. The new Circular is more than a mere revision to the earlier one; it is essentially a new document that establishes new FAR-based ground rules for conducting A-76 competitions, and a number of features of the new Circular reflect significant departures from its predecessor. For example, the in-house government entity submits, in response to the solicitation, an "agency tender" developed by an

Agency Tender Official (ATO), which must satisfy the proposal preparation requirements of section L of the solicitation. Revised Circular, attach. B, ¶ D.4.a(1). The agency tender will be evaluated against the same award criteria that apply to the private-sector proposals (with a few exceptions to take into account the unique posture of the agency tenders); the agency tender may be the subject of discussions and negotiations with the ATO (on behalf of the MEO); and the agency tender can be rejected as unacceptable. Revised Circular, attach. B, ¶ D.5.c(3). If the agency tender prevails in the competition, the contracting officer will incorporate appropriate portions of the solicitation and tender in an “MEO letter of obligation” issued to an official responsible for performance of the MEO. Revised Circular, attach. B, ¶ D.6.f(3). Finally, the public-sector source’s failure to perform in accordance with its obligations, as reflected in the letter of obligation, can result in a termination action. Revised Circular, attach. B, ¶ E.6.a(2).

These significant changes caused us to consider the question of whether we should now reach a different conclusion regarding the in-house entity’s standing to file a protest at GAO regarding the conduct or outcome of a public/private competition under the revised Circular. Accordingly, on June 13, 2003, we published a notice in the Federal Register soliciting comments on the revised Circular’s impact, if any, on the standing of an in-house entity to file a bid protest at GAO. 68 Fed. Reg. 35,411.

In response to the Federal Register notice, we received a total of 71 sets of comments: from members of Congress, agencies, unions, associations, and individuals (federal employees and private-sector lawyers). Some of the commenters supported the position that GAO should hear protests filed by an in-house entity where the competition was conducted under the revised Circular; others contended that, even under the revised Circular, there still is no statutory basis for standing of an in-house entity to file a protest at GAO.

Those who contend that the changes in the revised Circular justify our Office’s finding that the in-house entity qualifies as an interested party for purposes of challenging the conduct of public/private competitions conducted under the new Circular correctly point out that the language of the Circular has been recast in ways responding to specific points relied on by our Office for the conclusion that federal employees and their unions lacked standing to file protests at GAO. For example, as noted above, the agency tender in some ways is treated as an offer; if successful, the agency tender will lead to a formal letter of obligation; and the agency tender can be terminated if the public sector source fails to perform as required. The MEO and its agency tender thus are an integral part of the FAR-based competition, not separate from it as under the prior Circular.

Nevertheless, the distinctions between the two versions of the Circular cannot properly make a difference in our position that, under the current statutory language in CICA—which is the language we must look to in determining whether a party has standing to protest to our Office—the in-house entity lacks standing to protest. First and foremost, the MEO is still not competing for a contract: if the MEO wins the

competition, the work will be performed in-house and, notwithstanding the new Circular's use of the term "letter of obligation" and the reference to termination, there will be no contract. The letter of obligation is not a mutually binding legal relationship between two signatory parties--there is no contractual legal relationship between the MEO and the agency. Importantly, the agency cannot seek legal redress against the MEO, for example, by seeking reimbursement of excess procurement costs if the MEO is "terminated" for failure to meet its commitments. Cf. FAR § 49.402-2(e) (contractors are liable to the government for excess procurement costs when a contract has been terminated for default). Because the letter of obligation is not a contract, the MEO's "tender" cannot properly be viewed as an offer (since an offer is something that, if accepted, would create a contract, FAR § 2.101; Restatement (Second) of Contracts §§ 24, 35 (1981)). Hence, under the new Circular, as under the prior one, no in-house entity can qualify as an "actual or potential offeror" and thus as an interested party for purposes of filing a protest at GAO.

In addition, since the MEO is not an actual entity, it cannot have a "direct economic interest [that] would be affected by the award of the contract or by failure to award the contract," as CICA requires for a would-be protester to be an interested party. While individual employees certainly may have an interest in who wins the competition, the MEO, as a mere management plan, has no such interest. Even the employees' interest is problematic for at least two reasons. First, which employees would ultimately be affected, and how they would be affected, is not clear until long after a protest would need to be filed, since the government's "bump-and-retreat" rules, 5 C.F.R. §§ 351.701-351.705, make it hard to predict which employees would actually be affected by a decision to contract out. Second, individual employees' interests have never been viewed as establishing interested-party status, since to do so would allow any private competitor's employees to claim that status, a position that we have always rejected.

In sum, we find that, under the current language of CICA, our Office cannot consider a protest filed on behalf of an MEO, and we therefore dismiss Mr. Duefrene's protest.

DULL, NEUERBURG, AND MARTIN PROTESTS

On March 24, 2004, Kelley Dull, "in her capacity as President of American Federation of Government Employees, AFL-CIO, Council 171, the union, and in her capacity as the individual selected by a majority vote of affected employees to represent them on an OMB Circular A-76, the circular, competitive sourcing matter," protested "a sourcing decision by the Defense Finance and Accounting Service" to contract for desktop services. Protest, Mar. 24, 2004, at 1-2.

On March 26, 2004, Brenda Neuerburg, "in her capacity as President of American Federation of Government Employees, AFL-CIO, Council 117, the union, and in her capacity as the individual selected by a majority vote of affected employees to represent them on an OMB Circular A-76, the circular, competitive sourcing matter,"

protested a sourcing decision by the Department of Homeland Security to contract for background checks. Protest, Mar. 25, 2004, at 1-2.

On March 29, 2004, Gabrielle Martin, “in her capacity as President of the AFGE Council 216 . . . the union, and in her capacity as the individual selected by a majority vote of affected employees to represent them on an OMB Circular A-76, the circular, competitive sourcing matter and/or on a . . . procurement system matter,” protested the United States Equal Employment Opportunity Commission’s decision to contract for call-center services. Protest, Mar. 29, 2004, at 1-2.

In these protest filings, the protesters argue that these “sourcing decisions” violate the competition requirements of the revised Circular. Even assuming the protesters are correct and the agencies were required, under the revised Circular, to conduct a standard competition between the public and private sectors, the reasoning set out above applies equally to the standing of these protesters: under the current language of CICA, our Office is precluded from considering protests on behalf of in-house entities in A-76 competitions.

We recognize the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to our Office, while an unsuccessful public-sector competitor does not. As a result, consistent with the principles adopted unanimously by the Commercial Activities Panel in its April 2002 report, we are recommending that Congress consider amending CICA to allow protests to be brought on behalf of MEOs. Accordingly, by letter of today to the Chairman and Ranking Minority Member of the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Senate and House Committees on Armed Services, we are transmitting a copy of this decision, with the suggestion that Congress may wish to consider amending CICA to provide for MEO standing. The letter also suggests that any amendment to CICA specify who would be authorized to protest on the MEO’s behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees’ union representatives.

Because the protesters are not interested parties for purposes of filing a protest, we dismiss the protests.

Anthony H. Gamboa
General Counsel



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

B-293590.2; B-293590.3; B-293883; B-293887; B-293908

April 19, 2004

The Honorable Susan M. Collins
Chairman, Committee on Governmental Affairs
United States Senate

Dear Madam Chairman:

As you know, since the Office of Management and Budget (OMB) issued its revised Circular A-76 in May 2003, there has been controversy about whether in-house competitors should have standing to file bid protests at the General Accounting Office (GAO) to challenge the conduct of public/private competitions under the revised Circular. I am writing today to report to you GAO's legal conclusions regarding this matter. As explained in the enclosed bid protest decision, which we are issuing today, we conclude that, as the law stands now, no one has standing to file a bid protest at GAO on behalf of an in-house competitor (the "most efficient organization" or MEO). However, we believe that a number of policy considerations, including the principles unanimously agreed to by the Commercial Activities Panel, weigh in favor of allowing certain MEO protests with respect to public/private competitions conducted in accordance with OMB's revised Circular A-76. As a result, Congress may want to consider amending the law to allow such protests, and we set out in this letter some points that may be helpful in that consideration. We stand ready to help in drafting legislation or in other ways that you request.

GAO's statutory authority to hear bid protests is found in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000). CICA establishes the standard for standing to file a protest by allowing a protest to be filed only by an "interested party," with respect to a contract or a solicitation or other request for offers, and then defines an "interested party" 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); see also GAO's Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2004).

Under this definition of "interested party," we currently hear bid protests filed by private-sector firms that have participated in cost comparisons conducted pursuant to the Circular, since a private firm that participated in an A-76 cost comparison submits a proposal in response to a solicitation in the hope of obtaining a contract.

Thus, a private firm participating in an A-76 competition is “an actual . . . offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” In fact, during the past several years, GAO has considered dozens of protests from private firms challenging the conduct of A-76 cost comparisons.

In contrast, we have consistently found that federal employees and their unions lack standing to protest an A-76 cost comparison under the prior Circular. We concluded that they do not meet CICA’s definition of an “interested party” and, therefore, as a matter of law, we lack authority to consider their protests. In American Fed’n of Gov’t Employees et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 3-4, we identified a number of reasons for this conclusion. We pointed out that neither individual federal employees, nor the in-house plan (the MEO), nor the employees’ union representatives is an offeror. In addition, we found that the MEO plan submitted in an A-76 cost comparison under the prior Circular was not an offer as defined under the Federal Acquisition Regulation (FAR) because the MEO was not responding to a solicitation (under the prior Circular, the solicitation applied only to private-sector competitors), nor would the MEO, if adopted, lead to the formation of a contract, which is a mutually binding legal relationship to perform the services. Indeed, as we pointed out, no contract is awarded where the MEO prevails in the cost comparison. See also American Fed’n of Gov’t Employees, B-223323, June 18, 1986, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees–Recon., B-219590.3, May 6, 1986, 86-1 CPD ¶ 436 (affirming an earlier dismissal). Consistent with our review, the Court of Appeals for the Federal Circuit has also found that federal employees and their unions do not qualify as interested parties to protest a decision made under the prior Circular. American Fed’n of Gov’t Employees v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

The asymmetry between the protest rights of private-sector and public-sector participants in A-76 competitions has been widely criticized as unfair. As stated previously, the congressionally-chartered Commercial Activities Panel, which I chaired, recognized in its April 2002 report that the principle of fair treatment meant that both sides in these competitions should have rights as nearly equal as possible to challenge the way the competitions have been conducted. I believe that providing a level playing field in A-76 competitions, with regard to protest standing as well as other areas, is key to addressing the widespread lack of trust in the A-76 process. Important public policy concerns thus weigh in favor of allowing someone to file a GAO bid protest on behalf of the MEO. Our outreach efforts to both parties and to both Houses of Congress have led us to understand that there may be bipartisan interest in addressing these concerns.

On May 29, 2003, OMB issued a revised Circular A-76, which changes A-76 competitions to reflect a FAR-based process. Those favoring MEO standing argue that these changes to the Circular affect the standing of an in-house entity to file a bid protest at GAO. Accordingly, on June 13, 2003, GAO published a notice in the Federal Register soliciting comments on the revised Circular’s impact, if any, on the

standing of an in-house entity to file a bid protest at GAO. In response to the Federal Register notice, GAO received a total of 71 sets of comments that break down as follows: 1 letter from three members of Congress; 9 letters from agencies; 5 from unions; 7 from associations; 47 from individuals (including federal employees); and 2 from private lawyers. The comments ranged from those who argued that no one has standing to protest on behalf of an MEO unless CICA is amended (among others, the Office of the General Counsel of the Department of the Air Force took this position) to those, such as federal employees and their unions, who contended that the changes in the revised Circular justified GAO finding that the unions and individual employees now have standing to file protests, without the need to amend CICA.

We have carefully considered all of the comments received, as well as the deliberations in Congress last fall regarding this issue. As explained in the enclosed decision, the law requires us to find that, even under the revised Circular, the MEO is not an “actual or prospective offeror” and we, therefore, do not have legal authority to hear protests filed on behalf of MEOs. Accordingly, if MEOs are to be granted standing, that will be a decision for Congress to make, if it so decides, by amending CICA.

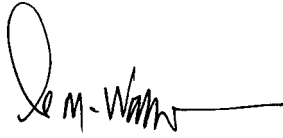
The question of representational capacity—who speaks for the MEO and could therefore file a protest on its behalf—is a separate question, and it is an important and difficult one. Importantly, there was no consensus on this point even among those responding to GAO’s June 2003 Federal Register notice who contended that the MEO had standing at GAO. Some believed that only the official who will develop and submit the agency tender, the Agency Tender Official (ATO), could file a protest; others thought, consistent with the revised Circular’s “directly interested party” definition, that either the ATO or an employee representative should be allowed to file; still others thought the unions should be allowed to file along with the ATO and the employee representative. In our view, choosing among those options, if MEO standing is permitted, is an important policy decision appropriately left to Congress.

In sum, we have reached the following conclusions. First, MEOs do not meet the current CICA definition of “interested parties,” so that GAO must dismiss protests filed by MEOs. Second, in light of the public policy concerns weighing in favor of allowing MEOs to file bid protests, Congress may wish to amend CICA. Finally, any amendment to CICA to allow MEO protest standing should specify whether standing extends to ATOs, individual federal employees (either as individuals or with one or more individuals acting on behalf of all affected employees), and/or federal employees’ union representatives.

We are available to discuss this matter, if you would like. In addition, if there is congressional interest in amending CICA to address these concerns, we would be happy to provide assistance in drafting appropriate legislation or to help in other ways that you request. We are sending similar letters to the Ranking Minority Member of your Committee as well as the Chairman and Ranking Minority Member,

House Committee on Government Reform as well as the Chairman and Ranking Minority Member of the Senate and House Committees on Armed Services. We will provide copies to other interested parties.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. M. Walker", with a horizontal line extending to the right.

David M. Walker
Comptroller General
of the United States

Enclosure