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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lawrence C. Drake

File: B-298143

Date: April 7, 2006

Lawrence C. Drake for the protester.
Rae Ellen James, Esq., Dennis Adelson, Esq., and Herman Narcho, Esq., Department of Labor, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

President of the affected local chapter of the American Federation of Government Employees is not an “interested party” for the purposes of filing and pursuing a protest regarding certain actions taken by the Department of Labor with regard to a cost comparison study to be conducted pursuant to Office of Management Budget Circular A-76.

DECISION

Lawrence C. Drake protests in letters dated March 27 and April 4, 2006 the determination by the Department of Labor that certain accounting services functions currently performed by agency employees “should be classified as a ‘Commercial Activity’ and competed pursuant to Office of Management and Budget Circular Number A-76.” Protests at 1.

We dismiss the protest.

According to Mr. Drake, he was informed on March 17, 2006, by an agency representative that “the public private competition for the 150 accounting functions would proceed” under Office of Management and Budget (OMB) Circular A-76. Mr. Drake states that the agency “has not yet assigned or published a formal solicitation number for the proposed public/private competition.” Additionally, Mr. Drake notes that he is the president of the local chapter of the American Federation of Government Employees (AFGE), whose members would be affected

by an agency determination to have the accounting functions performed by contract with a private firm, and that he “intends to notify the affected employees, and allow them to object to his acting as their agent,” Protest (Mar. 27, 2006) and that the AFGE has requested that he file this protest. Protest (Apr. 4, 2006).

Mr. Drake contends that our Office should consider him an interested party for the purposes of filing and pursuing this protest, given his status as the president of the affected local union chapter. In support of this, Mr. Drake points to a decision of the U.S. District Court for the District of Columbia and a decision of the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition, which according to Mr. Drake provide that a union representative has standing to challenge certain agency actions performed under Circular A-76.

Prior to the 2003 revisions to the Circular, we held that the then-current language of CICA did not permit representatives of in-house government competitors to pursue a protest before our forum. American Fed’n of Gov’t Employees et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 3-4. As a result of the significant changes that were made in the 2003 Circular, we again considered whether an in-house entity might have standing to file a protest here regarding the conduct or outcome of a public/private competition under the 2003 Circular. Again we concluded that without a change to the language of our bid protest statute (the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551-3556 (2000)), representatives of in-house government competitors could not pursue a protest before our forum. Dan Duefrene et al., B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 at 4-5.

On the same day that the Dan Duefrene decision was issued, the Comptroller General sent a letter to the cognizant congressional committees, explaining that, because an in-house competitor did not meet the CICA definition of an interested party, GAO was required to dismiss any protest that an in-house competitor filed. In the letter, the Comptroller General recognized that policy considerations, including the principles unanimously agreed to by the congressionally-chartered Commercial Activities Panel, weighed in favor of allowing certain protests by in-house competitors with respect to A-76 competitions and, as a result, Congress might want to consider amending CICA to allow our Office to decide such protests.

Consistent with that letter, Congress expanded the definition of an “interested party” that could file a bid protest. Specifically, CICA was amended to provide that the term “interested party”

includes the official responsible for submitting the Federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326(a), 118 Stat. 1811, 1848 (2004). Given our view that “it is for Congress to determine the circumstances under which an in-house entity has standing to protest the conduct of an A-76 competition,” 70 Fed. Reg. 19,679 (Apr. 14, 2005), we amended our Bid Protest Regulations to provide that

[i]n a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, the official responsible for submitting the Federal agency tender is also an interested party.

4 C.F.R. 21.0(a)(2) (2005).

As set forth above, CICA and our Bid Protest Regulations confer interested party status on the individual responsible for submitting the agency tender, and neither confers such status on a union representative or other individual purporting to represent the employees of the agency who are engaged in the performance of the activity or function subject to the public-private competition.¹ This amendment to our Bid Protest Regulations is consistent with both the express language of CICA as amended, and the intent of Congress as expressed in the conference report accompanying the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, which provided that “[a] person representing a majority of the employees would not have standing to file a protest, but would have the right to intervene in a protest filed by an interested party, including the [agency tender official].”² H.R. Conf. Rep. No. 108-767, at 648, reprinted in 2004 U.S.C.C.A.N. 1961, 2003.

¹ The “official responsible for submitting the Federal agency tender” is commonly known as the agency tender official, or ATO. Alan D. King, B-295529.6, Feb. 21, 2006, 2006 CPD ¶ 44 at 3, n.4.

² The protester appears to confuse the terms “interested party” and “intervenor” under our Bid Protest Regulations. An interested party under our Regulations “means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract,” and an interested party may generally file and pursue a protest with our Office. 4 C.F.R. § 21.0(a) and § 21.1(a). An intervenor “means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award of the protest is denied.” An intervenor may not necessarily be an interested party eligible to file a protest with our Office, but may participate in a protest filed by an interested party with our Office. As apparently recognized by the protester, and consistent with the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, under certain circumstances “a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the
(continued...) ”

As the protester recognizes, our Office's authority to consider bid protests is provided by CICA. As such, whether a court or another federal agency such as the Federal Aviation Administration confers standing on a union representative, or considers such a representative an interested party for the purposes of pursuing a matter involving OMB Circular A-76, is irrelevant to our determination here, because those entities are not governed by CICA. In light of this, and the clear language of our Bid Protest Regulations which do not recognize union representatives as interested parties for the purposes of filing and pursuing protests, we cannot consider Mr. Drake to be an interested party eligible to file and pursue this protest.³

The protest is dismissed.

Anthony H. Gamboa
General Counsel

(...continued)

public-private competition" may be an intervenor, 4 C.F.R. § 21.0(b)(2), even though he or she would not be an interested party eligible to file a protest.

³ We note that the protest appears to present other procedural issues, such as whether the protest is premature given that a solicitation has not yet been issued, and whether the challenge to the agency's determination that certain accounting services functions currently performed by agency employees "should be classified as a 'Commercial Activity' and competed pursuant to Office of Management and Budget Circular Number A-76" constitutes a cognizable basis of protest. However, we need not address these issues given our determination that Mr. Drake is not an interested party for the purposes of filing and pursuing this protest.