



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: United Way of the National Capital Area

File: B-311235

Date: May 16, 2008

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DIGEST

Government Accountability Office does not have jurisdiction to hear protest of the signing of a memorandum of understanding under a competition conducted by a Local Fund Campaign Committee of the Combined Federal Campaign, because, while this action would appear to be a procurement of services for the benefit of the government, a Local Fund Campaign Committee is not a federal agency.

DECISION

The United Way of the National Capital Area protests the selection of Global Impact by the Combined Federal Campaign of the National Capital Area (CFCNCA) to serve as the principal combined fund organization (PCFO) for the Combined Federal Campaign (CFC) activities in the Washington, D.C. metropolitan area. The United Way argues that the CFCNCA did not conduct a fair and reasonable competition in selecting Global Impact as the PCFO for the 2008 CFC campaign year. The Office of Personnel Management (OPM) argues that the CFCNCA is not a federal agency, and that our Office therefore does not have jurisdiction to hear this protest. As discussed below, we agree with OPM that our Office does not have jurisdiction to hear the protest and dismiss it on that basis.

BACKGROUND

Organization of the CFC

The CFC is the only officially-sanctioned program for soliciting federal government employees on behalf of charitable organizations. The CFC conducts annual campaigns in the federal workplace, and allows federal employees to make donations through payroll deductions or other forms of payment to an approved list of charities. The CFC has existed in various forms since the 1960s, and its origins lay in the efforts of various federal entities and commissions in the 1940s and 1950s to achieve uniformity in the manner in which federal employees are solicited by charities.¹

The current form of the CFC was established by two Presidential Executive Orders signed by President Reagan. Executive Order (E.O.) No. 12353 recognized the need to “support and facilitate fund-raising on behalf of voluntary agencies through on-the-job solicitations of Federal employees and members of the uniformed services, and to ensure that the recipient agencies are responsible in the uses of the monies so raised.” E.O. No. 12353, 47 Fed. Reg. 12785 (Mar. 23, 1982). Executive Order No. 12404 further explained the objectives of the CFC as follows:

The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail. . .

E.O. No. 12404, 48 Fed. Reg. 6685 (Feb. 10, 1983).

In order to meet the objectives of the CFC, the director of OPM is directed to “make arrangements” for the annual CFC, including prescribing “such rules and regulations as may be necessary to implement this Order.” E.O. No. 12353, 47 Fed. Reg. 12785 (Mar. 23, 1982). The CFC is now governed by regulations promulgated by OPM at 5 C.F.R. part 950. These OPM regulations define the CFC as “the charitable fundraising program established and administered by the Director of the Office of Personnel Management (OPM) pursuant to Executive Order No. 12353, as amended

¹ As OPM’s history of the CFC relates, “Prior to the 1950’s, on-the-job fundraising in the federal workplace was an uncontrolled free-for-all.” History of Charitable Fundraising Within the Federal Service, available at: http://www.opm.gov/cfc/html/cfc_hist.asp.

by Executive Order No. 12404, and all subsidiary units of such program.”² 5 C.F.R. § 950.101. The regulations state that the Director of OPM “exercises general supervision over all operations of the CFC, and takes all necessary steps to ensure the achievement of campaign objectives.” Id.

The CFC is comprised of more than 250 local campaigns across the country. Each local campaign is run by a local federal coordinating committee (LFCC), which is “the group of Federal officials designated by the Director to conduct the CFC in a particular community.” Id. LFCCs are comprised of volunteers who are federal government employees and representatives of employee unions and other employee groups. 5 C.F.R. § 950.103(a). Among the duties of the LFCC are ensuring compliance with OPM regulations, determining the eligibility of local charitable organizations to participate in the CFC, and selecting a PCFO to act as the LFCC’s “fiscal agent and campaign coordinator” to administer the campaign. 5 C.F.R. § 950.104(b), (c).

LFCCs must solicit applications from entities seeking to serve as PCFOs “on a competitive basis,” and, in making a selection decision, must consider such factors as “the capacity of the organization to manage an efficient and effective campaign, its history of public accountability, use of funds, truthfulness and accuracy in solicitations, and sound governance and fiscal management practices.” 5 C.F.R. § 950.104(c). The competition by LFCCs to select a PCFO must provide for a public solicitation, and the solicitation period must remain open for a minimum of 21 days. Id. The OPM website provides additional guidance to LFCCs for the selection of a PCFO, including deadlines for the LFCC to conduct the competition, minimum solicitation notice and evaluation periods, and requirements for evaluation. LFCC Guidance for PCFO Selection and Oversight, available at: <http://www.opm.gov/cfc/suggestions/25-Oct-PCFO-Selection-Process.asp>.

The PCFO is responsible for conducting the fundraising efforts of the local campaign and ensuring that employee donations are properly distributed to designated charities. 5 C.F.R. § 950.105(d). Participation as a PCFO is limited to “federations, charitable organizations or combinations thereof.” Id. at (c). All fees and reimbursement of expenses paid to a PCFO are taken from federal employees’

² In appropriations law decisions, we have stated that our Office “recognizes the CFC as a legitimate, government-sanctioned charity fund-raising campaign with which government agencies may cooperate.” Invoice to IRS for that Agency's Share of CFC Solicitation Expenses Incurred in Northern Utah in 1985, B-225860, Feb. 12, 1988, 67 Comp. Gen. 254. Our Office has also recognized that, under certain circumstances, agencies may expend appropriated funds “for the preparation of campaign instructions and mailing labels and for the distribution of campaign materials” in support of the CFC. Id.

donations through the CFC; no appropriated funds are used to pay PCFOs. OPM Request for Dismissal, Feb. 14, 2008, at 2.

The Instant Protest

The protest here concerns the competition conducted by the CFCNCA to select a PCFO for the 2008 campaign. The CFCNCA issued a solicitation in August 2007, stating that “[t]he Office of Personnel Management (OPM) has authorized the [CFCNCA] to conduct a contracting initiative with a PCFO for 2008.” Solicitation at 1. The solicitation further states that “Title 5, Code of Federal Regulations, Part 950.104 authorizes the LFCC to solicit applications from federations, charitable organizations, or combinations thereof to serve as the PCFO; and to select a PCFO to act as its fiscal agent and campaign administrator for the CFC.” Id. at 2.

The solicitation anticipated award of a memorandum of understanding (MOU) for a base period of 1 year, i.e., the 2008 campaign for the National Capital Area, with options for up to 2 additional years, i.e., the 2009 and 2010 campaigns. Applicants were instructed to “provide evidence of the organizational capacity, capability, and experience to meet the requirements of the statement of work, and submit a written campaign plan addressing the factors in the statement of work.” Solicitation at 11. As part of the written campaign plan, applicants were required to submit a “complete budget based on projected expenses . . . along with a narrative justification explaining rationale[s] or formulas used in calculating major cost categories.” Id. at 13. Applicants were also required to certify that they “will abide by the directions, decisions, and supervision of the LFCC and/or OPM’s Director and [Office of the Combined Federal Campaign].” Id.

In October 2007, the United Way responded to the solicitation.³ On February 1, 2008, the United Way received a letter stating that the CFCNCA had not selected its “proposal” to serve as PCFO.⁴ CFCNCA Letter to United Way, Feb. 1, 2008. The letter, however, did not provide an explanation for the rejection of the proposal, and

³ The application at issue here was submitted by the United Way of the National Capital Area and the United Black Fund, but the protest was filed and pursued primarily by the United Way.

⁴ The OPM regulations, discussed above, describe the submissions provided as a result of this competition as “applications.” 5 C.F.R. § 104(c). The solicitation here, and the letter advising the United Way that it was not selected, refer to these submissions as proposals. E.g., Solicitation at 1 (“To be considered, 5 copies of your proposals must be received by hand delivery . . .”); CFCNCA Letter to United Way, Feb. 1, 2008 (“Thank you for your proposal to serve as [PCFO] for the Combined Federal Campaign of the National Capital Area.”). From this point forward, we will use the terminology of the solicitation and refer to these submissions as proposals.

did not state whether an award had been made. The United Way requested a debriefing from the CFCNCA and OPM regarding its proposal prior to filing this protest, but both entities refused to debrief the United Way.⁵ Protest at 7.

On February 1, the CFCNCA entered into an MOU with Global Impact. Because, as discussed below, OPM declined to produce a report in response to this protest, the limited record here does not indicate the basis for the selection of the awardee's proposal.

The United Way filed this protest with our Office on February 8. The protest named OPM and the CFCNCA as the contracting agencies responsible for the procurement. Protest at 2. Prior to the due date for its report on the protest, OPM requested that we dismiss the protest for lack of jurisdiction. Specifically, OPM argued that the protest did not concern "a procurement or contract from OPM or any federal agency," but instead an MOU "between an organization made up of Federal employees acting in a voluntary status in a program under the general supervision of OPM." OPM Request for Dismissal, Feb. 14, 2008, at 1. OPM did not address any of the allegations raised in the United Way's protest regarding the award decision, nor did the agency request dismissal of the protest on any basis other than jurisdiction.

On February 26, we advised the parties via telephone conference and e-mail that we were still considering the jurisdictional issue, and that we would not dismiss the protest at that juncture. The 100-day statutory timelines in our protest process occasionally require us, as in this case, to develop a protest at the same time that we are considering a request for dismissal. We therefore requested that OPM submit a report on the protest, but also advised that the agency could further address its arguments regarding jurisdiction in its report. Instead of providing a report, OPM submitted a "Renewed Motion to Dismiss."

DISCUSSION

As discussed in detail below, we conclude that our Office does not have jurisdiction to hear the protest because it does not concern the award of a contract for the procurement of services by a federal agency. Under the Competition in Contracting Act of 1984 (CICA) and our Office's Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551, 3552 (2000);

⁵ The CFCNCA subsequently agreed to provide a debriefing to the United Way on March 4. E-mail from CFCNCA to United Way, Feb. 26, 2008. On March 3, however, the CFCNCA withdrew its offer of a debriefing, explaining as follows: "In light of the pending litigation initiated by [the United Way], we are unable to meet with you and your representatives regarding the [United Way] 2008 PCFO application on March 4, 200[8]." E-mail from CFCNCA to United Way, Mar. 3, 2008.

Bid Protest Regulations, 4 C.F.R. § 21.1(a) (2008). Our analysis of the issues in this protest concludes that, while what is at issue appears to be a procurement for services⁶ for the benefit of the government, the procurement was not conducted by a federal agency, and we therefore lack jurisdiction.

We first conclude that the MOU appears to concern a procurement for services. We reach this conclusion based on the fact that the LFCC issued a solicitation seeking competitive proposals for the performance of various services, in return for a reimbursement of the successful offeror's costs of performing those requirements. In addition, the solicitation specifically identifies the "services to be provided" by the PCFO in a "statement of work" that details the "requirements, performance expectations and deliverables required to serve as the PCFO to the local CFC campaign as outlined in 5 CFR 950 and CFC Guidance Memoranda." Solicitation at 2, 4. Further, the MOU awarded here states that Global Impact, the successful offeror, will "conduct CFC campaign support operations during the campaign year," including supporting the CFCNCA's oversight and audit responsibilities, and providing "annual, periodic, and monthly financial and programmatic reports of CFCNCA activities and events, budget, and financial matters." MOU at 1-2.

Next, we think that these services are for the benefit of the government because the head of the executive branch, acting via the above-described executive orders, has decided that there is a benefit to having a streamlined system for the collection and distribution of charitable employee donations in the federal workplace. As discussed above, the relevant executive orders specifically charge the director of OPM with establishing the CFC in order to "provide a convenient channel through which Federal public servants may contribute" to charitable causes, and "to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail." E.O. No. 12404, 48 Fed. Reg. 6685 (Feb. 10, 1983).

The services provided under the MOU here are thus procured for the purpose of assisting OPM in meeting its obligations under the relevant executive orders. In light of the purposes set forth in the executive orders, and the scope of the services identified in the solicitation and MOU, we conclude that the MOU would appear to be a contract for the procurement of services of more than *de minimis* value to the government, which would normally place the protest within the scope of our bid

⁶ For purposes of this decision, we consider the MOU a contract because it is a mutual agreement between the parties which requires Global Impact to perform services for the LFCC in return for reimbursement of its costs. In this regard, OPM argues that the MOU is not a government contract because the LFCC is not a federal agency, and that no federal agency is a party to the MOU; OPM does not dispute that the MOU appears to create a contractual obligation between the LFCC and Global Impact. See OPM Renewed Motion to Dismiss, Mar. 12, 2008, at 5.

protest jurisdiction.⁷ See Great South Bay Marina, Inc., B-296335, July 13, 2005, 2005 CPD ¶ 135 at 3.

Finally, we address whether this procurement for services was conducted by a federal agency. OPM argues that this protest concerns a competition conducted by the LFCCs, which, it contends, are entities outside of, or other than, the government. While we view this matter as a considerably closer call than does OPM, we agree.

The legal character of LFCCs and their relationship to OPM is sui generis. LFCCs are a creation of OPM, and OPM plays a central role in their function. The regulations promulgated by OPM state that the CFC shall be run at the local level by LFCCs, each of which is established by, and subject to the direct control and supervision of, the director of OPM.⁸ 5 C.F.R. § 950.101. The Director of OPM has authority to supervise, audit, investigate, and discipline the LFCCs. 5 C.F.R. §§ 950.102(c), 950.603. LFCCs, in turn, must obtain PCFO services, and must solicit proposals to do so, in accordance with OPM regulations. 5 C.F.R. § 950.104(c). Specifically, the OPM regulations direct the LFCCs to conduct a competition to select a PCFO. 5 C.F.R. § 950.104(c).

While we recognize that LFCCs appear to act in a quasi-official capacity, we see no basis to find that the LFCCs are themselves federal agencies. Moreover, while LFCCs are regulated by OPM, it is not clear that OPM is actually involved in, or responsible for the MOUs. As OPM notes, the agency is not involved with the drafting or issuance of solicitations, evaluation of proposals, or selection of successful offerors. Further, OPM notes that the LFCC here, the CFCNCA, is not comprised of OPM employees, but rather representatives from other federal agencies and employee unions, all of whom are acting on a voluntary basis. Additionally, the MOU here between the CFCNCA and Global Impact is signed by the chair of the CFCNCA, and was not signed or otherwise approved by OPM. See MOU at 6. On this record, while we think this issue is a close one, and while we recognize that the LFCCs are being used by OPM to supplement its management of the government-wide CFC effort, we cannot conclude the procurement conducted here by the CFCNCA was actually conducted by OPM, or any other federal agency.

⁷ In its initial request for dismissal, OPM argued that our Office lacked jurisdiction because the MOU does not involve appropriated funds. Since the passage of CICA, our bid protest jurisdiction has not been based on the expenditure of appropriated funds. USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 2. Instead, as discussed above, our jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Id.

⁸ As discussed above, OPM regulations define the CFC as the “charitable fundraising program established and administered by the Director of [OPM]” including “all subsidiary units of such program” such as the LFCCs. 5 C.F.R. § 950.101.

In summary, we conclude that this protest does not concern a procurement for services by a federal agency, and that therefore we do not have jurisdiction to hear this protest.

The protest is dismissed.

Gary L. Kepplinger
General Counsel