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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lisa Hartman-Designated Employee Agent

File: B-311247

Date: May 6, 2008

Lisa Hartman, Designated Employee Agent, the protester.
Phillipa L. Anderson, Esq., and Denis Foley, Esq., Department of Veterans Affairs, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed by a Designated Employee Agent alleging that a public-private competition under Office of Management and Budget Circular A-76 is required before the agency can award a contract for ground maintenance services which are currently being provided by 7 civilian employees (who also perform other functions, and none of whom will lose their jobs here) is denied because the Circular does not require issuance of a solicitation in the case of a function as small as this, and because recently-enacted changes to the Office of Federal Procurement Policy Act, 41 U.S.C. § 403, do not impose cost comparison requirements on conversions of functions performed by fewer than 10 employees.

DECISION

Lisa Hartman-Designated Employee Agent¹ protests the award of a contract to DWBH Services, Inc. under request for proposals (RFP) No. VA-786-07-RP-0220,

¹ Recently enacted changes to our bid protest statute grant interested party status to any one individual who has been designated as the agent of federal employees for purposes of representing them in a public-private competition, or for purposes of arguing that a public-private competition is required under the circumstances presented. Hence, we use the term “designated employee agent” to refer to both the protester and the person selected to represent federal employees in these challenges. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3, 62-63 (2008).

issued by the Department of Veterans Affairs (VA), National Cemetery Administration for grounds maintenance services for the Chattanooga National Cemetery. The protester argues that the agency is violating Office of Management and Budget (OMB) Circular A-76 by directly converting functions performed by federal employees to contractor performance without conducting a cost comparison.

We deny the protest.

The RFP was issued on September 13, 2007, as a service-disabled veteran-owned small business (SDVOSB) set-aside for a 1-year base period with three 1-year option periods. The services involve the setting and alignment of new or replacement headstones; lawn maintenance, including mowing, trimming and edging; and leaf collection. The amended closing date for receipt of proposals was October 10, 2007. After the receipt and evaluation of proposals, final proposal revisions were received on November 28. Award was made to DWBH on January 16, 2008 and a notice of award was published in FedBizOpps on January 18. This protest followed.

The protester states that seven federal employees are currently performing the cemetery maintenance services at the Chattanooga Cemetery.² The protester argues that the VA is violating the OMB Circular by directly converting functions performed by federal employees to contractor performance without conducting a cost comparison. The protester also maintains that the affected employees have been placed at a competitive disadvantage by the agency's action because they were not allowed to compete to retain their own work.

The VA responds that it has not converted a function performed by federal employees, because no agency job has been affected or lost as a result of the RFP. The agency states that it has been contracting for these services since 2001 and that it has informed current employees that this contract action would not have an impact on current cemetery employees. The agency also states that current employees perform interments, raising/realigning of headstones, grounds maintenance, such as grave repair, over seeding, headstone cleaning, shelter preparations, sod application, herbicide applications, equipment/vehicle maintenance, and program preparations. The agency states that as a result of the award under this RFP, the current employees will perform all of their current functions except headstone alignments and mowing.

With respect to the OMB Circular, the protester correctly notes that the current version of the Circular prescribes two types of cost comparisons. Where 65 or more full time equivalents (FTEs) are involved, the Circular requires a "standard

² The protester states that the number of employees performing this work has been reduced from 12 to 7, through attrition and a hiring freeze, with no corresponding decrease in workload.

competition”; where fewer than 65 FTEs are involved, the Circular permits either a standard or a “streamlined competition.” OMB Circular A-76 (May 29, 2003), attach. B, at B-1. In the situation here, the protester argues that the Circular requires, at a minimum, a streamlined competition for these requirements.³

In reviewing the protester’s allegations, we note that even though the Circular speaks of requiring a streamlined competition when a commercial activity is performed by an aggregate of 65 or fewer FTEs, as this one is, the Circular permits an agency to decide to contract out work based solely on an internal analysis without the issuance of a solicitation, and hence without use of the procurement system. Where an agency is not required to use the procurement system, and does not do so, our bid protest function has no role in reviewing the agency’s actions. See Vallie Bray, B-293840, B-293840.2, Mar. 30, 2004, 2004 CPD ¶ 52 at 3.

We recognize that the thresholds and requirements described in the OMB Circular--and the rights that apply at certain thresholds--have been significantly altered by a recently-enacted statute, which imposes its own requirements. Specifically, the Office of Federal Procurement Policy Act, 41 U.S.C. § 403 et seq., as amended by the National Defense Authorization Act for Fiscal Year 2008, requires a public-private competition prior to converting public sector jobs to contractor performance whenever the conversion involves “a function of an executive agency performed by 10 or more agency civilian employees.” National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 327, 122 Stat. 3 (2008). In these cases, the statute requires agencies to conduct a public-private competition that, among other things:

- (A) formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;
- (B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A-76, as implemented on May 29, 2003, or any successor circular;
- (C) includes the issuance of a solicitation . . .

Id.

³ The Circular explains the steps of a streamlined competition at Attachment B, Section C. This process allows the agency to use cost estimates to calculate the cost of performance, and encourages, but does not require, the development of a detailed proposal process for the public and private sectors.

Because the function at issue here involves fewer than 10 FTEs, however, the recent statutory requirements for a formal cost comparison, including issuance of a solicitation, do not apply to this agency action.

The protest is denied.

Gary L. Kepplinger
General Counsel