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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Bruce Bancroft--Agency Tender Official; Sam Rodriguez--Designated Employee Agent

File: B-400404.2; B-400404.3; B-400404.5

Date: October 31, 2008

Pennie C. Leachman, Esq., United States Marine Corps, for Bruce Bancroft--Agency Tender Official, and Diana Price, Esq., American Federation of Government Employees, for Sam Rodriguez--Designated Employee Agent, the protesters.

Johnathan M. Bailey, Esq., and David C. Bowman, Esq., Bailey & Bailey, P.C., for Phoenix Management, Inc., an intervenor.

Richard G. Welsh, Esq., and Mark S. Christopher, Esq., Department of the Navy, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency tender official and designated employee agent are not interested parties to protest agency actions other than final selection of the source of performance with regard to a pending public-private competition being conducted pursuant to Office of Management and Budget Circular A-76 that was initiated prior to January 28, 2008.

DECISION

Bruce Bancroft, the agency tender official (ATO) for the U.S. Marine Corps Installation West's tender in a public-private competition under Office of Management and Budget (OMB) Circular A-76, and Sam Rodriguez--Designated Employee Agent,¹ President of the American Federation of Government Employees

¹ As discussed in detail below, 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 have adopted the term "designated employee agent" to refer to both the protester and the person selected to represent

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Local 1881, protest various aspects of the pending competition being conducted by the Naval Facilities Engineering Command, Department of the Navy, for bulk fuel storage and distribution services at the Marine Corps Air Station, Miramar, California. The ATO and Rodriquez primarily argue that the Navy failed to complete the A-76 competition within the required statutory timeframe and thereby violated the associated limitation on expenditure of appropriated funds; the ATO also separately contends that the Navy cannot undertake the planned corrective action regarding its original selection decision of offeror Phoenix Management, Inc. (PMI) because, by the agency's own count, it is now beyond the statutory time period for completion of the A-76 competition study.

We dismiss the protests on the basis that the protesters do not qualify as "interested parties," as defined by applicable statute.

BACKGROUND

On February 7, 2006, the Navy published an announcement on the Federal Business Opportunities (FedBizOpps) website, publicizing the agency's intent to conduct a standard competition² to compare the cost of continued in-house performance of the requirements at issue, involving approximately 54 full-time equivalent (FTE) positions, with obtaining those services by contract. Among other things, the February 7 notice stated that "this notice represents the formal public announcement and official start date of a public-private competition of Bulk Fuel Storage and Distribution Services performed at Marine Corps Air Station, Miramar, California." Agency Report (AR), Tab 5, FedBizOpps Public-Private Competition Notice, Feb. 7, 2006, at 2. The notice also described the A-76 competition here as involving a "multi-function" study. Protest (B-400404.2), Aug. 1, 2008, attach. 12, FedBizOpps Public-Private Competition Amended Notice, Apr. 5, 2006 ("This is [a] Sources Sought Notice . . . for potential sources for a multi-function study for the Bulk Fuel Storage and Distribution Services at the U.S. Marine Corps Air Station (MCAS) Miramar, CA").

On December 5, 2006, the agency issued request for proposals (RFP) No.

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federal employees in these challenges. See Mark Whetstone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ 93 at 1.

² OMB Circular A-76 establishes the standard competition procedures at Attachment B, Section D. Under this process, the agency issues a solicitation, obtains offers from private-sector firms and an agency tender (which includes a staffing plan--referred to by the Circular as a most efficient organization (MEO)), performs a source selection, and then, based on the results of the competition, either makes award to a private-sector offeror or enters into a letter of obligation with the agency official responsible for performance of the MEO.

N62467-06-R-0080 in connection with the pending competition. The RFP included the various factors and subfactors that the agency would use to evaluate offerors' proposals and the agency tender. The RFP stated that the agency would select the prospective provider determined to have the lowest-priced, technically acceptable offer.³ RFP § M.2. The Navy received five private-sector proposals, including a proposal from PMI, as well as the agency tender, which was submitted by the ATO by the February 23, 2007 closing date.⁴ On May 8, 2008, the agency source selection authority determined that PMI's proposal represented the lowest-priced, technically acceptable offer. The Navy then made award to PMI and issued notice of its award decision on June 9, and provided the ATO with a debriefing on July 23. These protests followed.

The protests filed by the ATO and Rodriguez involve numerous issues that can be grouped into the following categories. First, the ATO protests that the Navy's evaluation of the agency tender and PMI's proposal was unreasonable, and that the agency's discussions with the ATO regarding its proposed staffing plan were not meaningful. Protest (B-400404), July 25, 2008; Protest (B-400404.4), Sept. 8, 2008. Second, Rodriguez protests that various members of the Navy's source selection team had impermissible conflicts of interest insofar as they were involved in a previous attempt by the agency to contract out performance of the fuels operation function via a direct conversion. Protest (B-400404.2), Aug. 1, 2008. Third, both protesters argue that the Navy failed to complete the study within the 30-month statutory timeframe relating to the expenditure of appropriated funds in connection with the study.⁵ Protest (B-400404.3), July 31, 2008; Protest (B-400404.2), Aug. 1,

³ The RFP, like the earlier February 7 notice, also described the A-76 competition as involving a multi-function study. See RFP § C.1.3.

⁴ Under the A-76 process, the agency tender was not in direct competition with PMI's proposal until the final cost comparison stage of the study process. Nevertheless, the agency tender was required to include a technical proposal identifying its approach to accomplishing the agency's requirements as established by the RFP, and the Navy evaluated the agency tender concurrently with the private sector proposals.

⁵ During all periods relevant to this protest, the annual Defense Appropriations Acts contained language as follows:

None of the funds appropriated by this Act shall be available to perform any cost study pursuant to the provisions of OMB Circular A-76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 30 months after initiation of such study for a multi-function activity.

Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, § 8022, 118 Stat. 951, 975 (2004); Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, § 8021, 119 Stat. 2680, 2703 (2005); Department of Defense

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2008. Fourth, Rodriguez protests that the agency failed to complete the study within the required 18-month timeframe established by OMB Circular A-76.⁶ Protest (B-400404.2), Aug. 1, 2008.

On September 12, the Navy announced its intent to take certain corrective action with regard to the protests. Specifically, the Navy plans to amend the RFP, permit the submission of revised proposals and agency tender, evaluate the revised submissions, and make a new source selection determination.⁷ Agency Letter to GAO, Sept. 12, 2008, at 1-2. In light thereof, we dismissed those aspects of the ATO

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Appropriations Act, 2007, Pub. L. No. 109-289, § 8019, 120 Stat. 1257, 1277 (2006); Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, § 8021, 121 Stat. 1295, 1319 (2007).

⁶ The A-76 Circular states, in relevant part:

A standard competition shall not exceed 12 months from public announcement (start date) to performance decision (end date) unless the [agency competitive sourcing official (CSO)] (without delegation) grants a time limit waiver. Before the public announcement of each standard competition, the CSO may grant a time limit waiver, in writing, allowing a specific standard competition to exceed the 12 month time limit by no more than 6 months, for a maximum of 18 months from public announcement (start date) to performance decision (end date) If an agency exceeds these time limits, including any extension that is the subject of the CSO's waiver, the CSO (without delegation) shall notify the Deputy Director for Management, OMB, in writing.

OMB Circular A-76, attach. B-6.

⁷ In its report to our Office (submitted before the decision to take corrective action), the Navy disputes the alleged failure to complete the study within applicable timeframes. Specifically, the Navy argues that it completed the multi-function study here within the applicable 30-month statutory timeframe as measured from the February 7, 2006, public announcement to the May 8, 2008, selection decision. The agency also contends that the limitation on the expenditure of appropriated funds is not a procurement statute within the meaning of GAO's bid protest jurisdiction, and that any alleged impropriety in that regard does not affect the validity of the agency's selection decision (*i.e.*, the awarded contract is not void, and there thus is no funding prohibition on a resulting contract and/or letter of obligation), since the remedy for any such impropriety would be limited to reporting a violation of the Anti-Deficiency Act. See 31 U.S.C. § 1351 (2000). The agency also argues that the time limits established by the Circular are merely procedural in nature, and that the Navy was granted an extension permitting the study here to be completed within 30 months. AR, Aug. 27, 2008, at 50-57.

and Rodriguez protests relating to the agency's selection decision (i.e., the evaluation issues and the conflict of interest issue). Bruce Bancroft--Agency Tender Official, B-400404, B-400404.4, Sept. 24, 2008; Sam Rodriguez--Designated Employee Agent, B-400404.2, Sept. 24, 2008. However, we did not dismiss the remaining issues--whether the study violated applicable statutory and Circular A-76 time limits--because we consider these protest grounds to be separate and distinct from the final selection determination, and they were not rendered academic by the agency's corrective action.

The ATO then filed an additional protest challenging the agency's corrective action. Specifically, the ATO argues that the Navy cannot implement the planned corrective action because, by the agency's own count, it is beyond the 30-month statutory timeframe for completion of the study and no further funds can be spent.⁸ Protest (B-400404.5), Sept. 18, 2008.

DISCUSSION

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000 and Supp. IV 2004), only an "interested party" may protest a federal procurement to our Office. This issue of whether the ATO and federal employees qualify as interested parties for the purpose of protesting public-private competitions conducted pursuant to OMB Circular A-76 has a lengthy history. In 2004, we concluded that an in-house competitor in an A-76 competition did not meet the statutory definition of interested party, Dan Duefrene et al., B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 at 4-5, and subsequently expressed 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." See 70 Fed. Reg. 19,679 (Apr. 14, 2005); Mark Whetstone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ 93 at 4.

Following our decision in Dan Duefrene, Congress expanded the definition of interested party. Specifically, under the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326(a)(2), 118 Stat. 1811, 1848 (2004), the ATO became an interested party for GAO bid protest purposes for A-76 studies involving more than 65 FTE employees initiated on or after

⁸ The ATO also contends that the Navy's corrective action is improper because it does not include termination of the contract awarded to PMI as an interim measure pending the Navy's new selection decision. There is no requirement that an agency terminate an awarded contract as part of its decision to reevaluate its original selection determination. In any event, the ATO does not dispute the fact that PMI is not currently performing the awarded contract while the Navy undertakes the planned corrective action.

January 26, 2005. See James C. Trump, B-299370, Feb. 20, 2007, 2007 CPD ¶ 40. Under the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 326, 122 Stat. 3, 63 (2008), enacted January 28, 2008, the statutory definition of interested party was again amended, this time deleting the provision that limited an ATO's interested party status to protests regarding "an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal Agency." Pub. L. No. 110-181, 122 Stat. 62. Similarly, the interested party definition was expanded to include the designated employee agent.

Section 326(d) of the NDAA, entitled "Applicability," also specifically identified the type of protests to which the new definition of interested party was applicable, stating that the definition "shall apply" to:

- (1) a protest or civil action that challenges final selection of the source of performance of an activity or function of a Federal agency that is made pursuant to a study initiated under Office of Management and Budget Circular A-76 on or after January 1, 2004; and
- (2) any other protest or civil action that relates to a public-private competition initiated under Office of Management and Budget Circular A-76 . . . on or after the date of the enactment of this Act [January 28, 2008].

Pub. L. No. 110-181, 122 Stat. 63.

For the reasons set forth below, we conclude that neither the ATO nor Rodriguez qualifies as an interested party under section 326(d) of the NDAA to pursue their remaining bases of protest. First, the protesters do not qualify as interested parties under section 326(d)(1) of the NDAA—that is, the protest issues that we did not previously dismiss as a result of the Navy's corrective action do not challenge the "final selection of the source of performance" pursuant to an A-76 study initiated after January 1, 2004. Rather, the remaining issues concern whether the duration of the study exceeds timeframes established by statute and the Circular—that is, actions other than the final selection of the source of performance. Similarly, the ATO's subsequent challenge to the Navy's corrective action is not a protest of a "final selection of the source of performance" as required by 326(d)(1) of the NDAA for interested party status.

Further, neither the ATO nor Rodriguez qualifies as an interested party under the criteria established in section 326(d)(2) of the NDAA—that is, the protests do not "relate to a public-private competition initiated . . . on or after the date of the enactment of this Act [January 28, 2008]." Our Office has previously determined that a study is "initiated" on the public announcement date, or "start date." Gary M. Williamson—Agency Tender Official, B-400153, Aug. 1, 2008, 2008 CPD ¶ 151 at 2; Jim Swistowicz—Designated Employee Agent, B-400101, July 7, 2008, 2008 CPD ¶ 135

at 3. The record reflects that the A-76 study here was initiated on February 7, 2006--almost 2 years prior to the January 28, 2008 enactment of the NDAA.⁹ Accordingly, section 326(d)(2) of the NDAA also does not confer interested party status on the ATO or Rodriguez in this matter.

In sum, as the remaining protest issues do not involve challenges to the Navy's final selection of the source of performance, and the study here was initiated before January 28, 2008, the ATO and Rodriguez are not interested parties to raise these issues. See Gary M. Williamson--Agency Tender Official, supra.

The protests are dismissed.

Gary L. Kepplinger
General Counsel

⁹ In fact, both the ATO and Rodriguez have argued that the A-76 study here was initiated even earlier than the February 7, 2006, public announcement date; the protesters contend that the study was initiated when the Navy began preliminary planning, and it is this additional time that results in the agency exceeding the 30-month statutory time limit for completion of the study.