



Decision

Matter of: Mark Whetstone-Designated Employee Agent

File: B-311327

Date: May 20, 2008

Mark Whetstone, Designated Employee Agent, for the protester.
Barbara Walthers, Esq., Department of Homeland Security, U.S. Citizenship and Immigration Services, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency is improperly converting a publicly performed function to a privately performed function without first conducting a public/private competition is dismissed where agency is acquiring the services in question through the exercise of an optional line item under a preexisting contract; the statute requiring agencies to conduct public/private competitions and providing designated employee agents standing to protest such competitions is, by its terms, inapplicable to acquisitions publicly announced prior to enactment of the statute.

DECISION

Mark Whetstone, Designated Employee Agent, protests the actions of the Department of Homeland Security, U.S. Citizenship and Immigration Services, Nebraska Service Center, under contract No. HSSCCG-07-D-0006. The protester maintains that the agency is improperly converting a function currently performed by agency adjudicators to a privately performed function without conducting a public/private competition.

We dismiss the protest.

The agency has four service centers, located in California, Nebraska, Texas and Vermont, where it performs immigration benefit application services. At each of the four service centers, the agency has a number of government employees that act as adjudicators whose function is to make determinations regarding the eligibility of applicants to receive immigration benefits. These determinations are made based on information included in each prospective beneficiary's application form.

In December, 2006, the agency issued a solicitation that contemplated the award of an indefinite-delivery, indefinite-quantity contract for a base year, with two 1-year options. The solicitation, as amended, called for the submission of proposals by February 28, 2007.

On September 21, the agency awarded a contract to SI International, Inc. after conducting a full and open competition among private concerns. The contract is for application processing support services at the Texas and Nebraska service centers, and contemplates the performance of mail processing, data collection, fee processing and file operation support services. Among other things, the contractor's employees currently perform data entry services by entering information, including the applicant's name, from the application forms into the agency's "CLAIMS 3" data base. Agency employees then take the names that have recently been entered into the CLAIMS 3 data base and run them through the Interagency Border Inspection System (IBIS) to determine whether the names from the CLAIMS 3 data base match names in criminal data bases included in the IBIS. Contractor employees then print out the results of the IBIS check and include the printout in the application files, which then are forwarded to government employees, who resolve any matches between CLAIMS 3 data base names and information in the IBIS criminal data bases.

The government adjudicators' responsibilities include entering data into the IBIS data base relating to any aliases that might be in the application file (IBIS alias checks). SI International's contract includes an optional line item to perform these IBIS alias checks, and this work is the subject of the instant protest.

On February 25, 2008, an agency employee forwarded to the protester an e-mail that included a draft of a message soliciting volunteers among the adjudicators at the agency's Nebraska processing center to engage in a test program that would involve SI International personnel performing the IBIS alias checks. Letter of Protest, Mar. 5, 2008, exh. 1. Based on the contents of this e-mail, Mr. Whetstone filed the instant protest, asserting that having SI International perform the IBIS alias checks would amount to the improper conversion of a function from government to contractor performance without the conduct of a public/private competition. According to the protester, such a competition is required for government/contractor conversions under the terms of section 739 of the Financial Services and General Government Appropriations Act, 2008 (enacted as Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2029-30 (2008)).

The statute that Mr. Whetstone alleges applies here, which requires agencies to conduct public/private competitions, was not enacted until approximately 3 months after the award of the contract that the protester challenges. The statute, by its terms, does not apply to contract actions publicly announced prior to its enactment, and only affords interested party status to designated employee agents to protest the conversion of a function performed by federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76 that was initiated after the date the statute was enacted. Sections 739 (a)(2)(E) and (c)(3) of the Financial Services and General Government

Appropriations Act, 2008 (enacted as Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2029-31 (2008)); see also section 326 (d) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No 110-181, Division A, subtitle C, 122 Stat. 3, 63 (2008). Specifically, the statute only provides standing to designated employee agents to challenge:

... a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, [made] on or after the date of enactment of this Act.”

Section 739 (c)(3) of the Financial Services and General Government Appropriations Act, 2008, supra. Given that the acquisition in question was conducted prior to the enactment of the statute, Mr. Whetstone does not have standing to maintain the subject protest.¹ We therefore decline to consider the merits of Mr. Whetstone’s protest.²

¹ Mr. Whetstone argues generally (in the context of maintaining that his protest is timely) that the agency made its decision to convert the IBIS alias check activity to private sector performance at the point in time that it considered exercising the option under SI International’s contract. We disagree. It was at the point in time that the agency included the optional line item for the IBIS alias checks in the solicitation, rather than at the point in time that the agency gave consideration to exercising the option, that the agency converted the activity to private sector performance, since the agency could acquire the services any time after awarding the contract, merely by exercising the option. See Navigation Servs. Corp., B-255241, Feb. 10, 1994, 94-1 CPD ¶ 99 at 2-3.

² The agency also asserts that Mr. Whetstone is not a legitimately designated employee agent because he was not selected by a majority of the agency’s adjudicators. In this connection, section 739 (c) of the Financial Services and General Government Appropriations Act, 2008, supra, changed the definition of “interested party” (under our statutory authority to hear bid protests) to include:

any one person who, for purposes of representing them in a protest under this subchapter that relates to such competition, has been designated as their agent by a majority of the employees of such Federal agency who are engaged in the performance of such function or activity.

See also section 326 (a) of the National Defense Authorization Act for Fiscal Year 2008, supra. The agency maintains that, while Mr. Whetstone has been designated as the employees’ agent by a majority of the adjudicators at its Nebraska service center, a majority of the adjudicators agency-wide have not designated Mr. Whetstone as their employee agent. We need not resolve the question at this point, since we find Mr. Whetstone’s protest otherwise not for consideration.

Even if we were to analyze Mr. Whetstone's protest independently of the the effective date of the Financial Services and General Government Appropriations Act, 2008, supra, the protest would still be untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (2008), protests based on alleged improprieties that are apparent on the face of a solicitation must be filed no later than the deadline for submitting bids or proposals. Here, the RFP as originally issued clearly included the IBIS alias check optional line item. Thus, in order for Mr. Whetstone's protest to be timely, he would have had to file no later than February 28, 2007. Since the protest was filed after that date, it is untimely. See Navigation Servs. Corp., supra.

The protest is dismissed.

Gary L. Kepplinger
General Counsel