



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: William A. Van Auken

File: B-293590

Date: February 6, 2004

William A. Van Auken, the protester.
Richard L. Moorhouse, Esq., and Stephen M. Sorett, Esq., Reed Smith, for SERCO Management Services, Inc., an intervenor.
Daniel N. Hylton, Esq., United States Department of Agriculture, for the agency.
Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed by federal employee on behalf of himself and other federal employees who assert that they are directly affected by agency's decision made pursuant to a competition conducted under Office of Management and Budget Circular A-76, as revised on May 29, 2003, to contract for work rather than to have the work performed in-house, is dismissed where agency requests dismissal and protester does not oppose that request; protester has apparently filed identical protest with agency, which agency intends to consider; dismissal is without prejudice to protester's filing a later protest with General Accounting Office if he is dissatisfied with agency's action on his agency-level protest.

DECISION

William A. Van Auken protests the United States Department of Agriculture's (USDA) decision, pursuant to Office of Management and Budget Circular A-76, that it would be more economical to perform the fleet maintenance services for the Forest Service in the Pacific Southwest region by contract awarded to SERCO Management Services, Inc. under request for proposals (RFP) No. R5SCO603058, rather than have the services performed in-house.

We dismiss the protest.

On January 20, 2004, Mr. Van Auken filed this protest challenging the USDA's decision to award a contract to SERCO. On the same date, Mr. Van Auken apparently filed a virtually identical challenge with USDA. With regard to the filing

at USDA, the Revised Circular (May 29, 2003) provides that “a directly interested party” may contest certain enumerated agency actions “taken in connection with the standard competition.” Revised Circular at B-20. The Revised Circular further provides that “the pursuit of a contest by a directly interested party and the resolution of such contest by the agency shall be governed by the procedures of FAR [Federal Acquisition Regulation] Subpart 33.103.” *Id.* FAR § 33.103 provides the procedures for filing and resolving agency-level protests.

USDA has requested dismissal of Mr. Van Auken’s protest because the agency views the protest filed with our Office as premature. The agency states that it “intends to address [the] agency-level contest through its normal procedures under FAR section 33.103.” USDA Request for Dismissal at 1. The agency further states that “dismissal of the current protest would allow the Government an opportunity to review the competition, address the allegations, and take appropriate action.” *Id.* at 2. Finally, the agency states that “pursuant to FAR section 33.103 [and the General Accounting Office’s (GAO) Bid Protest Regulations], agency-level protesters have a subsequent opportunity to assert their rights before the GAO should the agency-level protest be denied,” and that “any dismissal as premature would be without prejudice.” *Id.* at 3. In response to the agency’s dismissal request, Mr. Van Auken states that “we see no reason to object to this dismissal as long as this does not affect our . . . protest rights at the GAO level in the future.” Protester’s Response at 1.

In view of the unopposed request that we dismiss the protest, we will do so. With respect to Mr. Van Auken’s concern that our dismissal of the protest not affect his right to file a subsequent protest at GAO, we point out that, in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2003), a protester may file a protest with our Office if the protester is dissatisfied with an agency’s initial action in response to the agency-level protest. We direct the protester’s attention to the rules governing the timeliness of such a protest, as set out in the cited provision of our regulations and the published decisions of our Office.

In dismissing this protest, we are not addressing the issue of whether Mr. Van Auken has standing to file a bid protest with our Office. The Competition in Contracting Act of 1984 (CICA) establishes the standard for standing to file a protest here by stating that a protest may only be filed by an “interested party,” which is defined in the statute as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551(2); *see also* Bid Protest Regulations, 4 C.F.R. § 21.0(a). As we discussed in our Federal Register notice at 68 Fed. Reg. 35411 (June 13, 2003), the May 2003 revisions to the Circular raise a number of legal questions, most significantly, whether the revisions affect the standing of an in-house entity to file a bid protest at the GAO, and, if so, who should have the representational capacity to file such a protest.

In light of the dismissal of the protest, we do not reach the question of federal employees' standing to file protests with our Office under CICA, and this dismissal should not be read as an indication of how our Office will ultimately resolve that question.¹

The protest is dismissed.

Anthony H. Gamboa
General Counsel

¹Our Office's June 2003 Federal Register notice also solicited comments on other procedural issues potentially affected by the revisions to the Circular, in particular, the continued validity of GAO's longstanding rule, based on comity and efficiency, that our Office would generally not hear a protest of a cost comparison until the A-76 agency administrative appeals procedure had been exhausted. See Intelcom Support Servs., Inc., B-234488, Feb. 17, 1989, 89-1 CPD ¶ 174; Direct Delivery Sys., B-198361, May 16, 1980, 80-1 CPD ¶ 343. Our decision today to close this file is based on the unopposed request for dismissal and does not constitute a decision on the exhaustion requirement.