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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Gary M. Williamson--Agency Tender Official

File: B-400153

Date: August 1, 2008

Iris Miranda-Kirschner, Esq., Department of the Air Force, for the protester.
Gary R. Allen, Esq., Department of Air Force, Headquarters Air Force Legal Operations Agency, for the agency.
Brent Reynolds, Designated Employee Agent, an intervenor.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency tender official is not an interested party to protest agency actions other than final selection of the source of performance with regard to a pending public-private competition, to be conducted pursuant to Office of Management and Budget Circular No. A-76, that was initiated prior to enactment of the National Defense Authorization Act of 2008.

DECISION

Gary M. Williamson, the designated agency tender official (ATO) for the U.S. Air Force Mobility Command's tender in a public-private competition to be conducted pursuant to Office of Management and Budget (OMB) Circular No. A-76, protests various actions taken by the agency in preparation for release of solicitation No. FA4452-08-R-0008 that was issued in connection with the pending competition.[1] The ATO asserts that, in preparing to conduct the A-76 competition, the agency improperly released to other potential offerors certain cost and staffing information about the in-house organization currently performing the activities to be competed.

We dismiss the protest on the basis that the ATO does not qualify as an "interested party," as defined by applicable statute.

[1] The solicitation contemplates submission of proposals to provide precision measurement equipment laboratory (PMEL) services for various Air Force bases.

BACKGROUND

The record establishes that, on August 9, 2007, the Air Force publicly announced its initiation of the the A-76 study at issue here through publication on the federal business opportunities (FedBizOpps) Internet website. Agency Report (AR), Tab 8; see James C. Trump, B-299370, Feb. 20, 2007, 2007 CPD ¶ 40 at 2-3 (public announcement on FedBizOpps constitutes initiation of an A-76 competition). Thereafter, on August 14, the Air Force posted a competitive source decision package (CSDP) on FedBizOpps that contained certain information regarding costs and staffing related to the current in-house performance of the PMEL requirements. AR, Tab 9, at 2.

The ATO maintains that the information released in the CSDP was proprietary to the in-house organization currently performing the PMEL requirements. Accordingly, the ATO asserts that the pending A-76 competition should be canceled and that in-house performance of the PMEL functions should continue without further competition.

DISCUSSION

Under the bid protest provisions of the Competition in Contract Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (2000 and Supp. IV 2004), only an "interested party" may protest a federal procurement. The issue of whether federal employees qualify as "interested parties" for the purpose of protesting public-private competitions conducted pursuant to OMB Circular No. A-76 has a lengthy history. In 2004 this Office concluded that an in-house competitor in an A-76 competition did not meet the statutory definition of an "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 an "interested party" to include the official responsible for submitting the federal agency tender in an A-76 competition with regard to an activity or function performed by more than 65 full-time equivalent employees of the federal agency. Ronald W. Reagan National Defense Authorization Actor for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1848 (2004).

On January 28, 2008, the President signed the National Defense Authorization Act of Fiscal Year 2008 (NDAA) into law. Pub. L. No. 110-181, 122 Stat. 3 (2008). Among other things, the NDAA again amended the statutory definition of "interested party," 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. However, section 326(d) of the NDAA, titled "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.

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

On June 20, 2008, the Air Force requested that we dismiss the ATO's protest here, noting that the protest does not challenge the final selection of the source of performance, but rather challenges the agency's disclosure of information in connection with an A-76 competition that was initiated in August 2007, prior to enactment of the NDAA. Accordingly, the agency maintains that neither of the "Applicability" provisions in section 326(d) of the NDAA provide interested party status to the ATO for purposes of challenging the agency's actions in this matter. We agree.

As the agency first points out, the ATO does not qualify as an "interested party" under section 326(d)(1) of the NDAA--that is, the protest does not challenge the "final selection of the source of performance" pursuant to an A-76 study initiated after January 1, 2004. Rather, the protest challenges agency actions taken in preparation for publication of the solicitation--that is, actions other than the final selection of the source of performance. Accordingly, section 326(d)(1) of the NDAA does not provide a basis to apply that Act's definition of "interested party" to the ATO in this matter.

Similarly, the agency points out that the ATO does not qualify as an "interested party" under the criteria established in section 326(d)(2) of the NDAA--that is, the protest does not "relate to a public-private competition initiated . . . on or after the date of the enactment of this Act [January 28, 2008]." Rather, the protest relates to a competition that was initiated in August 2007--several months prior to the January 28, 2008 enactment of the NDAA. Accordingly, section 326(d)(2) of the NDAA does not provide a basis to apply the Act's definition of "interested party" to the ATO in this matter.

In short, the protest does not fit within either situation that triggers applicability of the NDAA's "interested party" definition. Accordingly, we must conclude that the

ATO does not qualify as an "interested party" to protest the agency's actions taken in connection with the pending public-private competition.[2]

The protest is dismissed.

Gary L. Kepplinger
General Counsel

[2] We note that, even if the prior statutory definition of "interested party" were applied to this protest, the ATO would not qualify because, under the prior definition, an ATO had standing as an "interested party" to file a protest only with regard to an A-76 competition involving a function performed by more than 65 full-time equivalent federal agency employees. Here, the agency's CSDP specifically stated that the function to be competed "encompasses 34 full time equivalents (FTEs)." Agency Report, Tab 9, at 2.