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**Comptroller General
of the United States**

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

Decision

Matter of: Gary Johnson -- Designated Employee Agent

File: B-310910.3

Date: January 21, 2009

Gary Johnson, Designated Employee Agent, American Federation of Government Employees, the protester.
Col. Neil S. Whiteman, Maj. Robert Ballenger, and Gary R. Allen, Esq., Department of the Air Force, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Designated Employee Agent is not an interested party to protest actions other than agency's final selection of the source of performance with regard to a public-private competition conducted pursuant to Office of Management and Budget Circular A-76 that was initiated prior to January 28, 2008.

DECISION

Gary Johnson, Designated Employee Agent (DEA),¹ American Federation of Government Employees, protests various aspects of the public-private competition conducted by the Department of the Air Force to perform civil engineering base operating services at Sheppard Air Force, Texas, pursuant to Office of Management and Budget (OMB) Circular A-76. The DEA challenges various aspects of the competition.

¹ As discussed below, recently enacted changes to our bid protest statute grant interested party status, with certain limitations, to an individual who has been designated as the agent of federal employees for purposes of representing them in a public-private competition; we have adopted the term "Designated Employee Agent" to refer to this individual.

We dismiss the protest on the basis that the DEA does not qualify as an “interested party,” as defined by applicable statute, with regard to the protest issues raised.

BACKGROUND

On September 29, 2006, the Air Force published an announcement on the Federal Business Opportunities (Fed BizOpps) website, publicizing the agency’s intent to conduct a standard competition to compare the cost of continued in-house performance of the requirements at issue with the cost of obtaining those services by contract.² Agency Report (AR), Tab 13, FedBizOpps Public-Private Competition Notice, Sept. 29, 2006. Among other things, the September 29 notice stated, “this notice represents the formal public announcement and official start date of a public-private competition of the 82nd Training Wing Base and Operating Support (BOS) functions performed at Sheppard Air Force Base.” Id.

On September 19, 2007, the agency issued request for proposals (RFP) No. FA3002-07-R-0021, advising potential offerors that “a source selection is in progress for the base operating support services, Civil Engineering, at Sheppard AFB,” and stating “[t]he anticipated period of Source Selection is from 19 Sep 07 through approximately 20 Aug 08.” AR, Tab 6, RFP, at 2. The RFP identified the various evaluation factors and subfactors to be applied, further providing that “[t]he performance decision will be based on the lowest cost of all offers and tenders determined to be technically acceptable after application of the OMB A-76 adjustment factors.” RFP at 98.

Between October 2007 and January 2008, the agency published eight sets of question and answers addressing the solicitation requirements. Private-sector proposals and the agency tender were submitted in February 2008 and, thereafter, the agency conducted discussions with the offerors and the agency tender official (ATO); final proposal revisions were submitted in August 2008.

On September 2, the agency announced its selection of a private contractor to perform the competed activities. On October 8, the DEA submitted this protest.³

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.

³ The DEA filed an initial protest on September 8. We dismissed that protest, without prejudice, to permit the agency to provide a debriefing to the DEA; the agency’s debriefing was provided on October 6.

The DEA first protests that the agency failed to complete the A-76 cost comparison process within the statutory timeframe established for expenditure of appropriated funds and/or the timeframe established by OMB Circular A-76. Additionally, the DEA protests that: the A-76 competition was improper because the competed function is allegedly undergoing a reorganization; the employees' rights were violated because access to certain information was limited to offerors; it was improper for offerors to communicate with the employees who are currently performing the competed activities; and the agency improperly performed the A-76 competition "at OMB's direction." Protest at 5-10.

DISCUSSION

Pursuant to the bid protest provisions of the Competition in Contracting Act of 1984 (CICA) 31 U.S.C. §§ 3551-3556 (2000 and Supp. IV 2004), only an "interested party" may protest a federal procurement to our Office. The issue of whether federal employees and/or their representatives 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, 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).

Following our decision in Dan Duefrene, legislation was enacted that expanded the definition of an interested party. First, under the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1848 (2004), an ATO was given interested party status for GAO bid protest purposes, with certain limitations.⁴ See James C. Trump, B-2999370, Feb. 20, 2007, 2007 CPD ¶ 40. Subsequently, under the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No 110-181, 122 Stat. 3 (2008), enacted on January 28, 2008, the definition of an interested party was again amended, eliminating the prior limitations with regard to the number of affected FTEs, and expanding the definition to include a DEA. 122 Stat. 62.

Nonetheless, the NDAA also limited the applicability of the expanded interested party definition with regard to A-76 competitions that were ongoing at the time of the NDAA's enactment. Specifically, the Act provided that, with regard to then-ongoing A-76 competitions, the expanded "interested party" definition was only applicable to

⁴ Under this Act, the ATO was given interested party status only with regard to A-76 competitions of an activity or function performed by more than 65 full-time equivalent (FTE) employees of a federal agency. 118 Stat. 1848.

a protest that “challenges final selection of the source of performance.” 122 Stat. 63.⁵ In short, the NDAA drew a distinction between permissible protest issues with regard to A-76 competitions that were already ongoing as opposed to competitions that would be subsequently initiated. For the former—that is, A-76 competitions such as the one at issue here that were ongoing at the time of the NDAA’s enactment—the NDAA expressly limited the scope of permissible protests to those challenging the agency’s final selection of the source of performance. *Id.* Thus, while the NDAA contemplates that, ultimately, DEAs will be authorized to protest any matter “that relates to a public-private competition,” a more limited scope of protests is authorized for A-76 competitions that were ongoing—and thus, partially completed—at the time of the NDAA’s enactment.

Here, none of the issues raised in the DEA’s protest challenges the agency’s source selection decision. That is, nothing in the protest indicates that the agency’s evaluation of proposals was flawed, or asserts that the agency’s conclusion that the private-sector offeror submitted the lowest cost, technically acceptable proposal, as contemplated by the terms of the competition, was inconsistent with the existing record.

Specifically, with regard to Johnson’s assertions that the agency failed to complete the A-76 cost comparison within the statutory timeframe established for expenditure of appropriated funds, or the timeframe established by OMB Circular A-76, we have held that such an allegation does not constitute a challenge to the agency’s final source selection decision. Bruce Bancroft—Agency Tender Official; Sam Rodriguez—Designated Employee Agent, B-400404.2 *et al.*, Oct. 31, 2008, 2008 CPD ¶ 200 at 6. Similarly, the DEA’s various assertions that the A-76 competition process was improperly conducted do not constitute challenges to the agency’s source selection decision. That is, all of the remaining DEA assertions regarding the alleged impropriety in the competition process—that the competed function is allegedly undergoing a reorganization; that employees’ rights were violated because access to certain information was only accessible to offerors; that offerors improperly communicated with the employees who are currently performing the competed activities; and that the agency improperly performed the A-76 competition “at OMB’s direction”—are procedural matters that preceded the agency’s source selection decision and, as such, are not properly within the scope of protests authorized by the NDAA.

⁵ In contrast, with regard to A-76 competitions initiated after enactment of the NDAA, the expanded interested party definition is applicable not only to protests challenging the final source selection decision, but also to “any other protest . . . that relates to a public-private competition initiated under Office of Management and Budget Circular A-76.” 122 Stat. 63.

The DEA asserts that all of the matters raised have some bearing on the final source selection decision and, thus, are properly swept into the scope of protests authorized by the NDAA. We disagree. It is clear that the NDAA provisions amending the interested party definition were structured to establish a more limited scope of protests with regard to A-76 competitions that were ongoing--and thus, partially completed--at the time of the NDAA's enactment. The DEA's proposed interpretation of the statutory authority would effectively eliminate the statute's distinction between then-ongoing A-76 competitions and subsequently-initiated competitions. It is a well-established rule of statutory construction that statutes must be read as a whole and in a manner that gives meaning to all provisions.⁶ Accordingly, we decline to construe the NDAA in a manner that would render meaningless the distinction between the scope of protests challenging A-76 competitions ongoing at the time of the NDAA's enactment and protests challenging A-76 competitions that are initiated after enactment.

Since none of the issues raised by the DEA's protest challenge the agency's source selection decision, the DEA is not an interested party for purposes of the protest issues raised.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

⁶ The United States Supreme Court has stated that "[i]t is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme'." United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217 (2001). See also 2A Sutherland, Statutes and Statutory Construction § 46:05, at 154 (6th ed. 2000) (a statute is passed as a whole and not in parts or sections; consequently each part or section should be construed in connection with every other part or section so as to produce a harmonious whole); Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 8 (in ascertaining the plain meaning of a statute, we necessarily look to the particular statutory language at issue, as well as the language and design of the statute as a whole).