

Contracting Out

Federal Employees, Union Cannot Protest Agency A-76 Cost Comparison, Decision to Contract Out to EG&G, GAO Says

The General Accounting Office June 7 decided that federal employees and their union are not eligible to challenge an agency's decision to contract out to the private sector commercial activities currently performed in-house (*American Federation of Government Employees, AFL-CIO, GAO, B-282904.2, 6/7/00*).

GAO dismissed the American Federation of Government Employees' protest of the Defense Logistics Agency's award to EG&G Logistics of a contract for material distribution services at the Defense Distribution Depot, Warner Robins, Ga. According to GAO, federal employees and their unions are not actual or prospective bidders or offerors, and thus cannot be considered "interested parties" eligible to protest an agency's decision, under Office of Management and Budget Circular A-76, to contract for work rather than perform it in-house.

The union and federal workers contended that had the cost comparison been performed properly, the determination would have been to retain the work in-house.

AFGE Also Rebuffed by COFC. This marks the second time in less than a month that the AFGE has been rebuffed in an effort to challenge a DLA contracting out decision. The U.S. Court of Federal Claims dismissed for lack of standing AFGE's challenge to DLA's award of a contract to EG&G for material distribution work at the Defense Distribution Center in Barstow, Calif. (73 FCR 585).

Taken together, the two decisions appear to leave federal employees who believe they have been adversely affected by an A-76 cost comparison or contracting out decision only one recourse—the internal agency appeals process required by A-76.

The A-76 Revised Supplemental Handbook says that the appeals procedure "does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals," GAO noted.

GAO Can Hear Private Sector Protests Only. When an agency has conducted an OMB Circular A-76 cost comparison, GAO is authorized to consider a protest filed by a private sector offeror alleging that the agency has not complied with the applicable procedures. However, this authority does not extend to protests filed by federal employees or their unions, GAO determined in the Warner Robins case.

Under the Competition in Contracting Act, a protest may be brought only by an "interested party," defined 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."

"Federal employees who assert that they will be affected by the agency's decision to contract for the work rather than perform it in-house and unions representing these employees are not interested parties eligible to maintain a protest under the applicable statute because they are not actual or prospective bidders or offerors under a solicitation," GAO reasoned.

Employees Don't Submit 'Offer.' The "most efficient organization" (MEO) is the entity proposed by the government to perform under the work statement drafted for the A-76 process. In order for anyone speaking for the government's MEO to have standing, the government's submission on behalf of the MEO would have to constitute an "offer," which, if accepted, would form a binding contract, GAO reasoned.

However, the MEO in-house management plan is not submitted in response to a solicitation, and if the A-76 cost comparison results in a determination that the work should be performed in-house, the solicitation is canceled and no contract is awarded.

"Because no contract is awarded, nothing submitted by the government regarding the performance of the activities in-house, such as the government's in-house management plan, can properly be considered an offer," GAO explained.

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GAO

In contrast, Defense Department maintenance depots are eligible to file bid protests at GAO "because of their unique status as governmental activities authorized to compete as separate entities for the assignment of workload," GAO added in a footnote.

FAIR Act Definition Inapplicable. GAO also rejected the protesters' argument that it should consider their protest because of language in the Federal Activities Inventory Reform (FAIR) Act.

That act, which requires agencies to submit to OMB a list of noninherently governmental functions performed by federal employees, provides that an "interested party" may challenge an agency's omission or inclusion of an activity on the list.

FAIR defines "interested party" to include an "officer or employee of an organization within an executive agency that is an actual or prospective offeror to per-

form the activity" and the "head of any labor organization" that represents such employees.

There is nothing in the language or legislative history of FAIR that suggests that the term "interested party" was intended to alter the definition of that term contained in CICA, GAO said.

BY MARTHA A. MATTHEWS

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Government Workers Withdraw Lawsuit Opposing Army's Logistics Modernization Plan

A government employees union has withdrawn its lawsuit opposing an Army plan to bypass the usual cost comparison process and award a \$680 million contract to a private sector firm to modernize logistics business processes, a union official told FCR June 7 (72 FCR 438).

National Federation of Federal Employees Local 1763 May 10 agreed to drop its lawsuit challenging the Army's decision to waive Office of Management and Budget Circular A-76 and seek only contractor performance for the 10 year combination firm fixed-price and time and materials task order contract. The union contended that the decision violated a number of federal laws—including the Federal Activities Inventory Reform (FAIR) Act (72 FCR 683).

Local 1763 President John Morris explained that NFFE agreed to drop the lawsuit for the Wholesale Logistics Modernization Program (referred to as LOGMOD) after the government agreed to:

- provide 150 former employees of the Army Communications-Electronics Command (CECOM) in St. Louis and Chambersburg, Pa., contractor jobs;
- increase from 67 to 79 the number of government employees that would make up the "retained government organization"—created to help ensure that the current systems do not fail during the transition to contractor performance and that military readiness is not adversely affected; and
- pay each affected employee a \$15,000 signing bonus and guarantee employment for three years.

Roughly 100 CECOM employees retired or accepted other government positions.

"We always thought that there was a better way of implementing the much needed modernization of the logistics system," Norris said. "For example, a partnership could have been formed that would have allowed for attrition rather than the highly disruptive reduction in force that the Army plan entailed. However, after all is said and done, NFFE was successful in protecting the jobs of all the government employees that chose not to retire at this time."

CSC Picked. Despite the pending lawsuit and efforts to slowdown the awarding of the contract by members of Congress, the Army Dec. 29 awarded the LOGMOD contract to Computer Sciences Corp., Falls Church, Va. (73 FCR 9).

Over the past six months, CSC has been gearing up to assume full responsibility for the program the first week of July.

CSC's compensation under the contract is directly linked to measurements around business process im-

provement and financial and customer satisfaction performance levels.

BY LEROY H. ARMES

Defense Industry

Lack of Written Agreement Doesn't Bar Firm From Proving Deal to Get Boeing Subcontract

Although two defense contractors never formally signed a written teaming agreement, one should be given a chance to prove that they agreed to work together to obtain a subcontract from the Boeing Co., the U.S. Court of Appeals for the Ninth Circuit decided May 31 (*Cable & Computer Technology Inc. v. Lockheed Sanders Inc. et al.*, 9th Cir., No. 99-55004, 5/31/00).

Although the district court was correct in ruling that a formal written teaming agreement between Lockheed Sanders Inc. and Cable & Computer Technology Inc. (CCT) did not exist, it should not have concluded that there was no evidence of an oral agreement, Judge John T. Noonan wrote.

Noonan found material facts in dispute with respect to CCT's remaining claims, and remanded the case for trial in the district court.

Dissenting, Judge William C. Canby said he was convinced that there was no contract between Lockheed Sanders and CCT.

No Written Agreement. In 1996, Boeing Defense and Space Group received an Air Force contract to upgrade the computer system for the B-1B bomber. Boeing then contacted CCT about being a potential subcontractor.

CCT, which previously had teamed with Lockheed Sanders on information technology upgrades, asked whether Lockheed Sanders was interested in working on the B-1B subcontract. The parties discussed a teaming arrangement, and CCT believed a deal was struck.

However, Lockheed Sanders said no agreement was reached. It withdrew in October 1996, leaving CCT unable to bid on the subcontract. Boeing ultimately selected another Lockheed Martin Corp. division to do the work.

CCT filed suit in state court alleging breach of contract by Lockheed Sanders. The case was transferred to federal court, which in April 1998 granted summary judgment to Lockheed Sanders on the breach of contract claim. CCT appealed to the Ninth Circuit.

Did Oral Contract Exist? CCT's project manager admitted that the \$20 million subcontract being awarded by Boeing would require a signed teaming agreement. In addition, the prior teaming agreements between the two companies were in writing. He also admitted that as of Oct. 24, 1996, the companies had not finalized the agreement, and that no agreement was actually executed.

Nevertheless, CCT insisted that a contract had been formed. CCT's president recounted a conversation with a Lockheed Sanders vice president, who reportedly said, "We've got a deal." The project manager said the two companies had an oral agreement to win the subcontract. Further, Lockheed Sanders officials were at