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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: James C. Trump

File: B-299370

Date: February 20, 2007

Andre Long, Esq., Naval Air Warfare Center Weapons Division, for the protester.
Robert E. Little, Esq., Naval Facilities Engineering Command, for the agency.
Daniel B. Abrahams, Esq., Michael D. Maloney, Esq., and Howard A. Wolf-Rodda, Esq., Epstein Becker & Green, P.C., for Rome Research Corporation, an intervenor.
Paul N. Wengert, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester serving as agency tender official, who filed protest on behalf of federal employees challenging the outcome of a public-private competition under Office of Management and Budget Circular A-76, is not an interested party with standing to pursue a protest at the Government Accountability Office where the public-private competition at issue was initiated prior to January 26, 2005.

DECISION

James C. Trump, the agency tender official (ATO) for the Naval Satellite Operations Center (NAVSOC) tender in a public-private competition under Office of Management and Budget (OMB) Circular A-76, protests the Navy's decision to procure operations and maintenance services for communications satellite systems at Point Mugu, California and various NAVSOC detachments, through a contract awarded to Rome Research Corporation, rather than continuing to have those services performed in-house by government employees. On behalf of the employees,¹ the ATO argues that the A-76 competition contained various flaws.

We dismiss the protest on the basis that the protester is not an interested party.

¹ The ATO states that this standard competition relates to a function performed by 83 full-time equivalent employees of NAVSOC. Protest at 1.

On January 11, 2005, the Navy published an announcement on the federal business opportunities (FedBizOpps) Internet website, publicizing the Navy's intent to conduct a standard competition to compare the cost of continued in-house performance of the requirements at issue with obtaining those services by contract. Among other things, the January 11 notice stated, "this notice represents the formal public announcement and official start date of a public-private competition of the [NAVSOC]." Thereafter, the Navy issued an RFP and the ATO submitted the agency tender on behalf of the government's most efficient organization (MEO), followed by discussions and the Navy's evaluation of the competing submissions. On January 4, 2007, the Navy announced its decision to obtain the services from Rome Research, and provided a debriefing to the ATO on that date.

Under the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326(a)(2), 118 Stat. 1811, 1848 (2004), codified at 31 U.S.C. § 3551 (Supp. IV 2004), the definition of an interested party eligible to file a protest was amended to include "the official responsible for submitting the Federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency." However, the amended statute also provided:

(d) APPLICABILITY.—The amendments made by this section shall apply to protests . . . that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the 90-day period beginning on the date of the enactment of this Act.

Pub. L. No. 108-375, § 326(d).

The "date of the enactment of this Act" was October 28, 2004, when the Act was signed by the President. On April 14, 2005, following public notice and an opportunity to comment, our Office amended our Bid Protest Regulations to conform to the Act, adding an ATO to the definition of an interested party. In so doing, we noted that the amendments were applicable to protests regarding A-76 competitions that are initiated more than 90 days after enactment of the Act—that is, on or after January 26, 2005. Specifically, we stated:

Protests filed at GAO . . . that relate to studies initiated under OMB Circular A-76 before January 26, 2005, will be considered under GAO's regulations as they were prior to the issuance of this final rule.

70 Fed Reg. 19679 (daily ed. Apr. 14, 2005).

As indicated above, the public announcement date, or "start date" under Circular A-76 for the competition at issue here was January 11, 2005. Accordingly, the public-private competition was initiated prior to the effective date of the statutory amendment authorizing protests by ATOs.

The ATO argues that we should construe the date the competition was “initiated” to be nearly 6 months later, based on the Navy’s subsequent issuance of another public notice on June 30. The ATO asserts that the June 30 notice constituted a “recommencement” of the public-private competition.

Our review of the record shows that the Navy’s June 30 notice was expressly designated as a “Modification to a Previous Notice” and, under the heading “Description,” the June 30 notice stated: “Update 6-30-05 > This is to inform interested parties that the solicitation number has been changed to N62467-05-R-0139.” The June 30 notice further stated that an industry forum would be conducted on July 15, and then included the words “Original notice,” followed by a verbatim repetition of the January 11 notice, including the statement, “this notice represents the formal public announcement and official start date of a public-private competition.” Based on the repetition of this language, the ATO argues that the Navy reinitiated the competition on June 30.

We have considered both notices, along with the parties’ arguments, and conclude that the second notice did not cancel and restart the A-76 competition. Rather, as the specific language of the second notice indicates, it was a “modification” and an “update” of the prior notice initiating the standard competition.² In several decisions, our Office has addressed the standing of federal employees to protest the result of an A-76 competition prior to the statutory amendment authorizing ATO protests, discussed above; we have concluded that, prior to the statutory amendment, federal employees did not meet the definition of an interested party, and thus were ineligible to protest a decision to contract out for the services. *E.g., Alan D. King*, B-295529.6, Feb. 21, 2006, 2006 CPD ¶ 44; *Dan Duefrene, et al.*, B-293590.2 *et al.*, Apr. 19, 2004, 2004 CPD ¶ 82.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000) (prior to amendment by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005), only an “interested party” may protest a federal procurement. Although there is no dispute that Mr. Trump is the ATO for the public-private competition being

² At our request, the Navy provided our Office and the parties a copy of the decision by the Competitive Source Official, extending the time limit under Circular A-76 to 18 months, and copies of internal Navy e-mails sent in mid-2006, in which the Navy acknowledged that it had become infeasible to meet the time limit. These provide a contemporaneous record confirming that the Navy uniformly treated January 11 as the start date for the competition at issue here.

challenged, he does not have the status of an interested party since the competition at issue here was initiated before January 26, 2005.

The protest is dismissed.

Gary L. Kepplinger
General Counsel