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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

# Decision

**Matter of:** Mark Whetstone--Designated Employee Agent

**File:** B-311284

**Date:** May 9, 2008

Mark Whetstone, Designated Employee Agent, the protester.
Barbara Walthers, Esq., Department of Homeland Security, for the agency.
Edward T. Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protest filed by Designated Employee Agent challenging agency's decision to issue a solicitation for processing a backlog of Freedom of Information Act requests without conducting a public-private competition is dismissed where the protester represents a class of employees whose positions are not at risk as a consequence of a contract awarded under the solicitation.

**DECISION**

Mark Whetstone-Designated Employee Agent,[1] President of the American Federation of Government Employees (AFGE) Local 3928, protests the issuance of solicitation No. HSSCCG-08-R-00001, a set-aside for service-disabled veteran-owned small business concerns, by the Department of Homeland Security, U.S. Citizenship and Immigration Service (USCIS), National Records Center at Lee's Summit Missouri, for services in support of processing the agency's backlog of Freedom of Information

[1] As discussed more fully below, recently enacted changes to our bid protest statute grant interested party status to any one individual who has been designated as the agent of federal employees for purposes of representing them in a public-private competition, or for purposes of arguing that a public-private competition is required under the circumstances presented. Hence, we will adopt the term "designated employee agent" to refer to both the protester and the person selected to represent federal employees in these challenges. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3, 62-63 (2008).

Act (FOIA) requests.[2] Mr. Whetstone argues that the solicitation was issued in violation of law and Office of Management and Budget (OMB) Circular A-76.

We dismiss the protest.

USCIS maintains a staff of approximately 80 federal employees to process FOIA requests. According to the agency, processing FOIA requests is a labor-intensive requirement. Presently, there is a substantial backlog of requests which have not been processed. In an effort to address this backlog, on February 13, 2008, the agency issued the solicitation here seeking a contractor to process a maximum of 65,000 "Routine (Track 1) or Complex (Track 2) backlogged FOIA requests" over a period of time of up to 2 years.[3] Agency Report (AR) at 2.

The protester filed this protest challenging the issuance of the solicitation on February 22. Specifically, Mr. Whetstone argues that the agency is violating the Financial Services and General Government Appropriations Act, 2008 (enacted as Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 739(a), 121 Stat. 1844, 2029-31 (2008)), section 327 of the National Defense Authorization Act for Fiscal Year 2008, and OMB Circular A-76 by converting a function performed by federal employees to private sector performance without first conducting a public-private competition to determine which is more cost-effective.[4]

The agency argues that Mr. Whetstone's protest should be dismissed because he does not qualify as an "interested party" to challenge the agency's decision to proceed with selecting a private sector firm to perform the FOIA backlog work since no federal employee will be replaced as a result of the contemplated contract--"the

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[2] FOIA, 5 U.S.C. § 552, was enacted in 1966 and generally provides persons with the right to request access to federal agency records or information. All executive branch agencies are required to disclose records upon receiving a written request, except for those records (or portions thereof) that are protected from public disclosure by one of nine exemptions or three special law enforcement record exclusions set forth under FOIA. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

[3] According to the agency, "government employees will conduct a 100% review of the contractor's work and make final determinations regarding the release or withholding of information" in response to the request. AR at 3.

[4] The protester also argues that the agency is acting in violation of the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(A)) as a consequence of its alleged violation of Pub. L. No. 110-161, which prohibits executive agencies from expending funds to "convert to contractor performance an activity or function" that is performed by more than 10 Federal employees unless, among other things, the conversion is based upon the results of a public-private competition.

government employees will continue to do the same jobs they are currently doing," there will be "no changes to their duties, work hours, . . . benefits, or other working conditions," and when the contract ends, "the government employees will continue processing FOIA requests and [the agency] will be able to maintain compliance with the FOIA law." Protest, Attach. 7, E-mail from Director of USCIS National Records Center, Dec. 20, 2007.

The issue of whether federal employees qualify as "interested parties" for the purpose of protesting public-private competitions conducted pursuant to A-76 has a lengthy history. Prior to the current version of the A-76 Circular, our Office held that the then-current language of the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-56 (2000) did not permit representatives of in-house government competitors to protest the conduct or outcome of a public-private competition conducted pursuant to the Circular before our forum. American Fed'n of Gov't Employees et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 3-4.

As a result of the significant revisions to the Circular in 2003, we again considered whether an in-house entity might have standing to file a protest here regarding the conduct or outcome of a public-private competition under the 2003 Circular. Again we concluded that without a change to the language in CICA, representatives of in-house government competitors could not pursue a protest before our forum. Dan Duefrene et al., B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 at 4-5.

On the same day that the Dan Duefrene decision was issued, the Comptroller General sent a letter to the cognizant congressional committees, explaining that, because an in-house competitor did not meet the CICA definition of an interested party, GAO was required to dismiss any protest that an in-house competitor filed. In the letter, the Comptroller General recognized that policy considerations, including the establishment of a level playing field between public and private sector competitors, a principle unanimously agreed to by the congressionally-chartered Commercial Activities Panel, weighed in favor of allowing certain protests by in-house competitors with respect to A-76 competitions and, as a result, Congress might want to consider amending CICA to allow our Office to decide such protests.

Consistent with that letter, Congress expanded the definition of an "interested party" that could file a bid protest. Specifically, CICA was amended to provide that the term "interested party"

> includes 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.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326(a), 118 Stat. 1811, 1848 (2004). Given 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," 70 Fed. Reg. 19,679 (Apr. 14, 2005), we amended our Bid Protest Regulations to provide that

> [i]n 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, the official responsible for submitting the Federal agency tender is also an interested party.

4 C.F.R. § 21.0(a)(2) (2005).

As set forth above, CICA and our Bid Protest Regulations conferred interested party status on the individual responsible for submitting the agency tender, and did not confer such status on any other individual purporting to represent the employees of the agency who are engaged in the performance of the activity or function subject to the public-private competition.[5]

In section 326 of the National Defense Authorization Act for Fiscal Year 2008, codified at 31 U.S.C. § 3551(2), Congress again amended the definition of an "interested party," thereby granting to federal employees, through an agent which they designate, protest rights involving A-76 competitions.[6] Through this change, Congress sought to "give federal employees the same right to appeal the outcome of a public-private competition that contractors competing against those employees already have." H.R. Rep. No. 110-477, at ____ (2007) (Conf. Rep.). In relevant part, section 3551(2) was amended as follows:

> (2) The term "interested party"--
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> (B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 with respect to the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to

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[5] The "official responsible for submitting the Federal agency tender" is commonly known as the agency tender official, or ATO. Alan D. King, B-295529.6, Feb. 21, 2006, 2006 CPD ¶ 44 at 3 n.4.

[6] In expanding the "interested party" definition, the statute also deleted the provision that otherwise limited protests of A-76 competitions by ATO's to those competitions involving 65 or more full-time equivalent employees of a federal agency.

> private sector performance without a competition under Office of Management and Budget Circular A-76, includes--
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> (ii) any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest under this subchapter that relates to such public-private competition, has been designated as the agent of the Federal employees by a majority of such employees.

31 U.S.C. § 3551(2).[7]

As noted above, prior to this amendment, only private sector offerors and agency tender officials qualified as interested parties for the purpose of protesting to our Office A-76 public-private competitions. See Lawrence C. Drake, B-298143, Apr. 7, 2006, 2006 CPD ¶ 63.

Mr. Whetstone maintains that he qualifies as an interested party under 31 U.S.C. § 3551(2) since he has been designated by a majority of the federal employees who are presently performing the FOIA processing "function" to represent them in this protest and because he is challenging the agency's decision to convert the FOIA processing function to contractor performance without an A-76 competition.[8]

We conclude that Mr. Whetstone does not fall within the definition of an interested party because his challenge does not in fact concern a "decision to convert a function performed by Federal employees to private sector performance without a competition." In this regard, the record reflects that the agency is merely seeking to supplement the existing federal employee workforce performing the FOIA processing function at issue with a contractor--the existing workforce's current work is not being converted to private sector performance. Under these circumstances the interested party provision relied upon by Mr. Whetstone has no application.

We recognize that as a consequence of our interpretation, federal employees' jobs must be at stake in order for their designated agent to qualify as an interested party to challenge an agency's conversion of a function to performance by the private

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[7] As a consequence of this statutory change, our Office recently issued proposed changes to our Bid Protest Regulations. See 77 Fed. Reg. 15,098-101 (Mar. 21, 2008).

[8] Mr. Whetstone made an affirmative representation that he has been designated by a majority of the agency employees presently processing FOIA requests as their agent for filing this protest. The agency has not challenged this representation.

sector. Mr. Whetstone argues that Congress never intended that federal employees be required to demonstrate that their jobs are at risk before filing a protest with our Office, since the statute merely references "functions" and not jobs. Protester's Comments, Mar. 31, 2008, at 3. In this argument, Mr. Whetstone suggests that regardless of any actual harm, Congress has granted federal employees interested-party status "to benefit taxpayers"--bestowing upon them standing to enforce agencies' use of the public-private competition system to justify their choices of how to obtain services for the ultimate benefit of taxpayers. Id.

Rather than leveling the playing field between public and private sector competitors, such a conclusion would endow federal employees with protest rights significantly beyond those of private-sector protesters, who must in fact establish harm as a consequence of agency action. M&M Investigations, Inc., B-299369.2, B-299369.3, Oct. 24, 2007, 2007 CPD ¶ 200 at 5 n.3 (stating "[c]ompetitive prejudice is an essential element of a viable protest); Trauma Serv. Group, B-254674.2, Mar. 14, 1994, 94-1 CPD ¶ 199 at 6. Prejudice is one of the fundamental tenets of our protest forum and a vital element of our process, since it ensures that the parties have a real stake in the outcome of the issues raised and that the questions presented will be addressed by parties with a true appreciation and understanding of the consequences of the outcome. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (stating requirement for showing of "concrete injury" in a case "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982))). There simply is nothing in the statute itself or the legislative history evidencing Congressional intent to alter our protest forum in the fundamental manner suggested by the protester. Absent such a clear expression, we will not read the statute to effect such a change.

The protest is dismissed.

Gary L. Kepplinger
General Counsel