



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Jim Swistowicz--Designated Employee Agent

File: B-400101

Date: July 7, 2008

Jim Swistowicz, Designated Employee Agent, for the protester.
Vera Meza, Esq., U.S. Army Materiel Command, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester, Designated Employee Agent for federal labor union, is not an interested party with standing to challenge agency's decision to conduct public-private competition under Office of Management and Budget Circular A-76, where the competition was initiated prior to January 28, 2008.

DECISION

Jim Swistowicz--Designated Employee Agent, President of the American Federation of Government Employees (AFGE) Local 1808, protests the Department of the Army's issuance of request for proposals (RFP) No. W56HZV-08-R-A0005, for base support, supply, and maintenance operations at Sierra Army Depot, Herlong, California. Mr. Swistowicz asserts that this procurement--a public-private competition under Office of Management and Budget (OMB) Circular A-76--is improper because OMB is statutorily prohibited from requiring an agency to prepare for, undertake, continue, or complete a public-private competition.

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

This is a recompetition of an A-76 procurement conducted in 2000, resulting in award to a "most efficient organization" composed of some 91 federal and 41 contractor employees. On September 14, 2007, the Army published an announcement on the Federal Business Opportunities (FedBizOpps) Internet website, stating its intent to conduct a standard competition for this requirement in accordance with the revised Circular A-76. Among other things, the September 14 notice stated that "the date of this public announcement is the official start date for this public-private competition." Thereafter, on April 14, 2008, the Army issued an RFP with a closing

date of May 29. On April 24, Mr. Swistowicz filed this protest challenging the agency's decision to conduct the competition. He argues that, under the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, section 323, 122 Stat. 3, 60 (2008), codified at 10 U.S.C. § 2461(a)(4), this procurement is improper because OMB is prohibited from requiring a military department or defense agency to conduct a public-private competition under Circular A-76 at the end of the performance period specified in a letter of obligation or other agreement entered into with Department of Defense civilian employees pursuant to a public-private competition. Mr. Swistowicz also asserts that the solicitation is flawed because it fails to list health and retirement benefits as a source selection factor, as required by the act, Pub. L. No. 110-181, section 322, 122 Stat. at 58, codified at 10 U.S.C. § 2461(a)(1)(G).

In addition to the referenced provisions (and other provisions not relevant here), section 326 of the National Defense Authorization Act for Fiscal Year 2008, codified at 31 U.S.C. § 3551(2), amended the definition of an interested party eligible to file a protest with our Office to include:

(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)(B)(ii).

Mr. Swistowicz states that he has been designated as agent by a majority of the federal employees affected by the agency's actions. Protest at 1. However, while this fact would be sufficient for Mr. Swistowicz to meet the above definition, under a provision entitled APPLICABILITY, the act identifies the actions to which the amended provision extends as follows:

(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, or to a decision to convert a function performed by Federal employees to private sector performance without a competition 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, § 326(d), 122 Stat. at 63.

As indicated above, the public announcement date or “start date” for the current competition was September 14, 2007, prior to the January 28, 2008 date of enactment of the act. We have held, under similar circumstances, that the date on which a public-private competition is initiated is the date identified as the “start date” in the agency’s public announcement. James C. Trump, B-299370, Feb. 20, 2007, 2007 CPD ¶ 40. That decision concerned an agency tender official (ATO) who protested a Circular A-76 public-private competition shortly after ATOs were defined as interested parties by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, section 326(a)(2), 118 Stat. 1811, 1848. As with the act here, that act’s “applicability” section provided that the amendments in question applied to protests “initiated” after the date of enactment of the act. Id. at 2-3. As also is the case here, the indicated “start date” of the protested competition was prior to the effective date set for applicability of the provision defining ATOs as interested parties. We concluded that the procurement had been initiated prior to the effective date of the act, and that Mr. Trump therefore was not an interested party for purposes of protesting the agency’s actions. Id. at 3-4. Similarly, here, since the “start date” of the procurement was prior to the effective date of the act, Mr. Swistowicz does not qualify as an interested party to challenge the agency’s decision to conduct the public-private competition in issue or the terms of the solicitation.¹

Mr. Swistowicz acknowledges that section 326(a) of the act, as amended, limits his ability to protest competitions initiated before January 28, 2008, and agrees that this competition was initiated prior to that date. He asserts, however, that his protest should not be dismissed because he is challenging a source selection and, under the act, he is an interested party to challenge the source selection of any competition initiated after January 1, 2004. While the protester is correct regarding his standing to challenge a source selection, no selection has yet been made here. Thus, the protest in this regard is

¹ For the record, although the protester does not rely on the earlier-enacted Financial Services and General Government Appropriations Act, 2008 (enacted as Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2029-30 (2008)), the protester is not an interested party under an analysis of this statute either. The “start date” of this procurement preceded enactment of the Consolidated Appropriations Act as well.

premature, and not for our consideration at this time. Sun Chem. Corp.,
B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13.²

The protest is dismissed.

Gary L. Kepplinger
General Counsel

² Mr. Swistowicz requests that we declare that all of his protest issues will be considered timely filed if brought following the source selection. Comments at 2. We will address the timeliness of any issues raised in a subsequent protest at the time of that protest.