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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Vallie Bray

File: B-293840; B-293840.2

Date: March 30, 2004

Vallie Bray, the protester.

Daniel N. Hylton, Esq., United States Department of Agriculture, for the agency.
Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed by federal employee on behalf of other federal employees who assert that they are directly affected by agency's decision made pursuant to a streamlined competition conducted under Office of Management and Budget Circular A-76, as revised on May 29, 2003, to contract for the work, rather than to continue to perform the work in-house, is dismissed because, as permitted under the Circular's streamlined procedures, the decision to contract out the work was based on the agency's internal analysis and was not made pursuant to a solicitation; under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), and the General Accounting Office's Bid Protest Regulations, 4 C.F.R. Part 21 (2004), GAO's jurisdiction is limited to considering protests involving solicitations and awards made or proposed to be made under those solicitations.

DECISION

Vallie Bray, President of the American Federation of Government Employees (AFGE) Local 3147, protests the United States Department of Agriculture's (USDA) Beltsville Agricultural Research Center's (BARC) decision, pursuant to a streamlined competition conducted under Office of Management and Budget (OMB) Circular A-76, that it would be more economical to perform the security guard function at BARC by contract, rather than to have the services performed in-house.

We dismiss the protest.

The study for security services at BARC involves 24 positions. USDA conducted this competitive sourcing action as a streamlined competition pursuant to the May 29, 2003 revised Circular A-76. As relevant here, under the revised Circular, the agency

may use the streamlined competition “if, on the start date, a commercial activity is performed by . . . an aggregate of 65 or fewer [full-time equivalents (FTEs)].” Revised Circular, attach. B, ¶ A.5.b(1). As permitted by the streamlined competition procedures, USDA prepared a cost estimate based on the incumbent activity, but did not develop an in-house plan (a plan for a “most efficient organization” or MEO). USDA based its estimate of the cost of private-sector performance on market research. USDA did not solicit any private-sector proposals from vendors. On November 5, 2003, USDA announced its decision to have the work performed commercially. The agency then implemented that decision by issuing an order under the General Services Administration’s Federal Supply Schedule. On March 15 and March 26, 2004, subsequent to the issuance of the order, Ms. Bray filed protests with our Office challenging the agency’s actions under the streamlined competition.¹

USDA has requested dismissal of Ms. Bray’s protest. USDA argues that under the streamlined competition, USDA “did not solicit or otherwise request offers, nor did any entity have offeror or bidder status during the streamlined competition.” USDA Dismissal Request at 2. Since under CICA, 31 U.S.C. § 3551 (2000), and our Office’s Bid Protest Regulations, 4 C.F.R. § 21.1(a) (2004), our Office’s jurisdiction is limited to considering protests involving solicitations issued by federal agencies and awards made or proposed to be made under those solicitations, USDA argues that our Office lacks jurisdiction to hear Ms. Bray’s protest. USDA also points out that under the revised Circular, “[n]o party may contest any aspect of a streamlined competition.” Revised Circular, attach. B, ¶ F. 2. Ms. Bray responds that our Office has the authority to review USDA’s decision because the decision was based on a flawed competition or comparison between the public and private sectors. Protester Response to Dismissal Request at 2-4.

Initially, while it is true that the revised Circular states that no party may contest any aspect of a streamlined competition, this language does not preclude a protest to our Office because CICA, not the revised Circular, provides the basis for our bid protest authority. Thus, an interested party, as defined by CICA and our Bid Protest Regulations, may protest a streamlined competition to our Office where the agency elects to use the procurement system and conducts a competition by issuing a

¹ According to Ms. Bray’s protest, AFGE Local 3147 is the exclusive representative for the bargaining unit that includes the employees who face displacement based on the agency’s decision to contract for this work. In her protest to the agency and to our Office, Ms. Bray also asserts that she has been selected by the majority vote of affected employees to represent them. Protest at 1. In light of the dismissal of the protest for lack of jurisdiction, as discussed below, we do not reach the question of federal employees’ standing to file protests with our Office under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), and this dismissal should not be read as an indication of how our Office will ultimately resolve that question.

solicitation to determine whether a private-sector entity can perform the work more cost effectively. See Revised Circular, attach. B, ¶ C.1.

However, here, as permitted under the revised Circular's streamlined procedures, the record shows that the decision to contract out the work was based solely on the agency's internal analysis and was not made pursuant to a solicitation. As USDA correctly argues, under CICA, and our Bid Protest Regulations, our Office's jurisdiction is limited to considering protests involving solicitations issued by federal agencies and awards made or proposed to be made under those solicitations. Holiday Inn; Baymont Inn & Suites, B-288099.3, B-288099.4, Sept. 20, 2001, 2001 CPD ¶ 166 at 5. In these circumstances, where USDA used streamlined procedures, but did not issue a solicitation for purposes of conducting a procurement to determine whether to contract out or to perform work in-house, we conclude that we lack jurisdiction to consider Ms. Bray's protest.

Our conclusion is consistent with prior decisions of our Office in which we have addressed the basis for our jurisdiction to hear specific A-76 protests. See, e.g., Trajen, Inc., B-284310, B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61 at 3. If an agency issues a solicitation as part of an A-76 study, thereby using the procurement system to determine whether to contract out or to perform work in-house, our Office will consider a protest by an actual or prospective offeror under that solicitation alleging that the agency has not complied with the applicable procedures in its selection process, or has conducted an evaluation that is inconsistent with the solicitation criteria or applicable statutes and regulations. Id. Where, as here, however, the agency conducts a streamlined competition without the aid of the procurement system to support its decision to contract out or to perform the work in-house, we have no statutory basis to hear a protest by any party, whether from the public or the private sector.²

The protest is dismissed.

Anthony H. Gamboa
General Counsel

² Where an agency conducts a streamlined competition without issuing a solicitation and decides to contract the work out, it may subsequently issue a solicitation to select a particular private-sector provider. See Revised Circular, attach. B, ¶ C.3(d)(1). We would have jurisdiction to consider a protest filed by anyone who qualified as an actual or prospective offeror under that solicitation.