



February 18, 2005

Mr. Michael R. Golden
Assistant General Counsel
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

RE: Government Accountability Office, Administrative Practices and Procedure, Bid
Protest Regulations, Government Contracts

Dear Mr. Golden:

The Contracts Services Association (CSA) appreciates this opportunity to provide comments on the proposed rule issued by the Government Accountability Office (GAO) on its Bid Protest Regulations for Government Contracts (*Federal Register*, Vol. 69, No. 243, December 20, 2004).

By way of background, CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to Federal, state, and local governments. CSA members do over \$40 billion in Government contracts and employ nearly 500,000 workers, with two-thirds of those employees being members of private sector employee unions. CSA members represent the diversity of the Government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HubZone, Native American owned firms and global multi-billion dollar corporations. CSA promotes Excellence in Contracting by offering significant professional development opportunities for Government contractors and Government employees, including the only program manager certification program for service contractors.

CSA applauds GAO for expeditiously issuing this proposed rule to gather comments on implementation of Section 326 of the FY05 National Defense Authorization Act (P.L. 108-375). Section 326 of the conference report amends the Competition in Contracting Act (CICA) to allow the Agency Tender Official (ATO) legal standing in a bid protest before GAO for public-private competitions involving more than 65 full time equivalents (FTEs). The ATO could initiate the protest, or do so at the request of a majority of the affected employees (unless the ATO determines there is no basis to file a protest). The ATO must notify the Congress when such a determination is made.

CSA has long supported balancing the rights and responsibilities of participants in the competitive sourcing process. The May 2003 revision to the Office of Management and Budget Circular (OMB) A-76 Circular puts the process for standard public-private competitions under the normal regulatory (FAR) process.

GAO rightly did not propose any language related to the streamlined competition process. This conforms with congressional intent. Congress specifically chose not to address the streamlined competition process when it enacted the bid protest language in section 326 of P.L. 108-375. Under the Revised Circular, neither party (private or public sector) may file a protest – this is to ensure a true streamlined process that can be conducted in a timely matter.

Furthermore, under the proposed rule, GAO specifically states that it will not review the decision by the ATO to file, or not file a protest – this is a decision that rightly should be left to the agency and not second-guessed by GAO, or even Congress.

CSA thanks you for this opportunity to provide comments. Should you need any further information from CSA, please contact Cathy Garman, CSA's senior vice president for public policy at 703-243-2020 (or cathy@csa-dc.org).

Sincerely,

A handwritten signature in black ink that reads "Chris Jahn". The signature is written in a cursive, flowing style.

Chris Jahn
President



National Federation of Federal Employees



Affiliated with the International Association of Machinists and Aerospace Workers
Local 276, USDA-FS, Forest Products Laboratory

We work for America every day

February 17, 2005

RECEIVED
 USGAO
 2005 FEB 17 PM 4:57

Michael R. Golden
 Assistant General Counsel
 General Accounting Office
 441 G Street, NW
 Washington, DC 20548

RE: Comments to Federal Register Notice, Vol. 69, No. 243 (December 20, 2004)
 Administrative Practice and Procedure, Bid Protest Regulations, Government
 Contracts

Dear Mr. Golden:

On behalf of Federal Lodge 276 of the National Federation of Federal Employees, FD-1, IAMAW, we respectfully submit the following comments in response to the notice posted in the Federal Register referenced above (hereinafter "Notice"), which pertains to proposed revisions to the General Accounting Office's (GAO) Bid Protest Regulations to implement the National Defense Authorization Act for Fiscal Year 2005 (Authorization Act).

According to the Notice, we understand that GAO will propose that the official responsible for submitting the federal agency tender in a public-private competition (agency tender official or ATO) conducted under OMB Circular A-76 (or revised Circular) will be given interested party status for the purposes of initiating a GAO protest.

GAO review of determination by ATO whether or not a protest has a reasonable basis is permitted by the statute and should be part of the process to meet the stated intent of Congress

House Conference Report 108-767 states that the intent of the enacted provisions is to provide "*civilian employees (or their representatives) and contractors (or their representatives) [with] comparable treatment regarding legal standing to challenge the way in which a public-private competition has been conducted before the Government Accountability Office (GAO) or in the U.S. Court of Federal Claims.*" The proposed rules do not achieve this objective. The position of the agency tender official (ATO) is

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Page 2 of 4

not equivalent to that of contractor representatives. The latter are directly accountable to owners or corporate officials who stand to gain financially in the event work is outsourced to their firm. Corporate representatives, therefore, have a strong incentive to take any action that might possibly result in this outcome. The ATO, on the other hand, is not directly accountable to federal employees undergoing study, and therefore has no such incentive. On the contrary, because they are accountable only to their politically-motivated superiors in the organization, the reality is that ATOs might well stand to benefit financially in the event of outsourcing, and would therefore have a financial disincentive to protest on behalf of the employees they purportedly represent. To give just one example, the official who managed the Forest Service Content Analysis Team received a promotion following the outsourcing of the work for which she had been responsible. Would a contract manager be rewarded for loosing work? How can the statute be implemented in such a way as to effect the stated intent of Congress?

The Notice proposes to add to 4 CFR 21.5, "*(k) Decision whether or not to file a protest on behalf of Federal employees. GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.*" The statutory language underlying this proposed change is at 31 USC 3552(b)(1), which states in relevant part, "*At the request of a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to such public-private competition the official shall file a protest in connection with such public-private competition unless the official determines that there is no reasonable basis for the protest.*" 31 USC 3552(b)(2) states, "*The determination of an agency tender official under paragraph (1) whether or not to file a protest is not subject to administrative or judicial review.*"

Under these provisions, the ATO has two decisions to make. Under (1), s/he must determine whether or not there is a reasonable basis for the protest. If there is, the ATO has no discretion regarding whether or not to file a protest: the statute requires that s/he *shall* file one. If, on the other hand, the ATO determines that, to the best of his/her knowledge and belief, there is no reasonable basis for the protest, the statute is silent on whether or not s/he shall file one. It is clearly not prohibited for the ATO to file a protest in such a case, nor is it outside the realm of possibility that s/he may decide to do so. The level of expertise of an agency official serving in the capacity of ATO is certainly much less than that of GAO, and it immanently reasonable that an ATO whose opinion differs from that of the employees whom s/he purportedly represents in this matter might decide to defer to GAO by filing a protest and putting the matter before the experts. The determination of whether or not to file a protest is stated in paragraph (2). The fact that this is stated as a separate determination indicates the ATO has discretion, which, because paragraph (1) is prescriptive for the case of protests deemed to be reasonable, only exists if the ATO considers the protest to have no reasonable basis.

The statute removes from administrative and judicial review the ATO's paragraph (2) determination of whether or not to file a protest if his/her determination of its reasonableness differs from that of the affected employees who have requested said

Page 3 of 4

protest. It does not remove from review the paragraph (1) determination by the ATO of whether or not the employees' requested protest has a reasonable basis.

To meet the stated intent of the statutory changes, it is crucial that GAO retain the authority to review the ATO's determination of whether or not the employees' request for a protest has a reasonable basis. As is discussed above, limiting the authority to protest to the ATO is on its face flawed because his/her incentives are not similar to those of contractor representatives; however, the statute provides a correction to this difficulty by putting the ultimate authority in the hands of the affected federal employees. If the employees request that a protest be filed, and if it has a reasonable basis, the ATO has no choice but to file it. The intent is clearly that the protest be filed if it is reasonable. A second way in which to ensure Congressional intent in met, and one which is entirely consistent with the language of the statute, is to provide oversight on the technical question of whether or not the employees' requested protest has a reasonable basis.

If, irrespective of the concerns discussed above, you elect to implement the new rule at 4 CFR 21.5(k), we ask that you (1) request Congress to amend this provision to specifically authorize GAO with the authority to review the ATO's determination of whether or not a potential protest has a reasonable basis, and (2) perform a study on the incentives to which ATOs are subjected in A-76 studies, including changes in their positions in the agency following the outsourcing of agency work, for the purpose of advising Congress regarding who should speak for the A-76 most efficient organization (MEO).

For units with unions, the union should be the representative of the majority of employees under Sec. 3552(b) and 3553(g)

Under the labor statute, employees select a labor organization to be their exclusive representative by well-established procedures. The labor organization so selected is statutorily obliged to represent all employees in the unit. The regulations should make it clear that when there is a certified labor organization in a unit or units undergoing A-76 study, it is the representative of the majority of employees with respect to Sec. Sec. 3552(b) and 3553(g). In addition to the legal arguments for this laid out in the comments of NFFE General Council Grundmann, with which we wholly agree, there is also the undeniable fact that the *ad hoc* designation of a group or individual to represent the majority of employees would place an additional and unjustified burden on employees. The development and implementation of a verifiable designation process within the short time-frames allowed by A-76 protests would hinder the efforts of employee representatives to develop a reasonable protest by diversion of resources to this unproductive work. It is in the interest of the American taxpayer that protests be decided on the merits of the case, not on unnecessary procedural barriers. Indeed, Congress has found that the participation of employees through labor unions safeguards the public interest and contributes to the effective conduct of public business (5 USC 7101(a)(1)). Regulations should ensure their ability to do so in the present matter.

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Page 4 of 4

Other Procedural Matters

1. Exhaustion of Administrative Remedies

We agree that a protester should not be required to file an agency-level protest as a prerequisite to filing a protest at GAO. Requiring exhaustion of administrative appeals unnecessarily delays impartial third-party review by the GAO.

2. Review of Streamlined Competitions

We agree that GAO should consider protests of streamlined competitions which result in solicitations.

We appreciate the opportunity to voice our concerns on this matter. Your attention is greatly appreciated.

Sincerely,

Mark Davis
Chief Steward

One Gifford Pinchot Drive
Madison, Wisconsin 53726

608-231-9474 (phone) 608-231-9538 (fax) mwdavis01@fs.fed.us (email)

From: "BURT, GEORGE" <GEORGE.BURT@DFAS.MIL>
To: <RegComments@gao.gov>
Date: 12/27/2004 12:04:40 PM
Subject: A-76 Process

To Whom It May Concern:

Having been a part of an A-76 Study and Business Case Analysis for Defense Finance and Accounting Service. And, having read numerous books articles by some of the best Business Thinkers of our time, I feel somebody is forgetting the most important quotient, the Employee. There is no place where the A-76 process that shows if the Employee feels comfortable with what their Management is going to commit them to do. It is the Employees who do the work. And this applies to both sides, the contractor and the government bidder. Because nobody knows more about the product being produced than the Employee who makes the product on a daily basis. And, know body knows the Customer better than the Employee who has to deal with the Customer on daily basis.

So, keeping the above in mind, why shouldn't there be a check and balances of some sort, using the Employees of contractors and government in-house bidder. That before, a determination is made, for either side, the Employee's have to buy in that the Bid submitted by either party can be accomplished and at the price that was given. This now makes the Employee's stakeholders of the winning bid, and commits them to provide a quality product for the life of the contract. It is called Empowerment, and it is about time somebody in the Government gets on the train.

R. George Burt
Civilian Payroll Technician
DFAS Pensacola

Linda S Lebowitz - FR Doc. 04-27615 Filed 12-16-04; 10:03 am

From: Pfeiffer Mark S <Mark.S.Pfeiffer@irs.gov>
To: "RegComments@gao.gov" <RegComments@gao.gov>
Date: 1/7/2005 4:21:29 PM
Subject: FR Doc. 04-27615 Filed 12-16-04; 10:03 am

By linking "intervenor" status of "... a person representing a majority of the employees of the Federal agency ..." to "... the official responsible for submitting the Federal agency tender..."; and, then making such "intervenor" status dependent upon "... an interested party [filing] a protest in connection with a public-private competition...", where the "interested party" is defined as "... the official responsible for submitting the Federal agency tender... "; and, then including the language under "Sec. 21.5 Protest issues not for consideration.", the proposed rule does nothing more than create the illusion that Government employees will have someone in their court. It is hard to imagine that "the official responsible for submitting the Federal agency tender" will ever be viewed as an honest broker, when it comes to advocating the interests of Government employees.

Is this really what Congress intended?

Mark S. Pfeiffer, ACPO
Field Procurement Operations, Western Area
333 Market Street, Room 1400
San Francisco, CA 94105-2115

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(415) 385-8687 (Cell)
(415) 848-4710 (Main Office)
(415) 848-4711 (FAX)

February 8, 2005

RegComments@GAO.gov

Attention:
Michael R. Golden
Assistant General Counsel,
Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Mr. Golden,

I would like to respond or make comments to GAO's Proposed Rules, Federal Register, Vol. 69, No. 243, dated Monday, December 20, 2004. My comments are regarding 4 CFR Part 21, Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts.

Comment 1 Interested Party

Proposed change

21.0 Definitions

(a)(1) ***

(a)(2) 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, the official responsible for submitting the Federal agency tender is also an *interested party*.

Issue with proposed language: In the A76 Circular, appendix B, the number of employees defines when an agency is not authorized to use the **streamlined competitive** process. When more than 65 FTE's are included into the study only a standard study may be conducted. Standard competitions may be conducted when 65 or less FTE's are included into a study.

Appendix B of Circular A76 states:

5.a. An agency shall use a standard competition if, on the start date, a commercial activity is performed by:

- 1. The agency with an aggregate of more than 65 fte's; or*

5b. An agency shall use either a streamlined or standard competition if, on the start date, a commercial activity is performed by:

- 1. The agency with an aggregate of 65 or fewer fte's and/ or any number of military personnel; or*

A Federal ATO's authority to protest should be in accordance with the logic used when the GAO set the Vallie Bray precedent. In *Vallie Bray*, GAO concluded that, where a streamlined competition is conducted without using the procurement system – that is, without a solicitation being issued – GAO lacks

jurisdiction under CICA to consider a protest. If, however, an agency issues a solicitation as part of a streamlined A-76 competition, thereby using the procurement system to determine whether to contract out or to perform work in-house, GAO would consider a protest by an interested party alleging that the agency had not complied with the applicable procedures in the selection process or that the agency had conducted an evaluation that was inconsistent with the solicitation's evaluation criteria or applicable statutes and regulations. GAO in the Proposed Rules [December 20, 2004] stated that they intend to follow the Vallie Bray precedent with respect to protests of streamlined competitions conducted under the revised circular. If a standard competition or a streamlined competition withstood the scrutiny of GAO and would allow private interested party(s) to protest, then any interested party including the Agency ATO should have that same right.

Comment 2 Interested Party

Proposed change

21.0 Definitions

(a)(1) ***

(a)(2) 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, the official responsible for submitting the Federal agency tender is also an *interested party*.

Issue with proposed language: The language proposed excludes an important check and balance to the public private competition. It does not represent the best interests to the taxpayer. The definition of an interested party must include language that allows for the exclusive representative of the affected employees to be considered as an interested party.

When OMB revised the Circular A76, May 29, 2003, Their summary states quite clearly, "(3) *make agencies accountable to taxpayers for results achieved from public – private competitions, irrespective of the source or sector that performs the work.*" OMB's language clearly states that the purpose of Circular A76 is to provide the taxpayers with accountability irregardless of the source or sector that performs the work. Accountability and safeguards of public interests are also mentioned in Chapter 71 of Title 5 US Code:

7101. Findings and purpose

(a) The Congress finds that-

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them

(a) safeguards the public interest,

(b) contributes to the effective conduct of public business, and

(c) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

What is not defined in either the Statute or OMB's Circular is that only an agency official, such as the ATO will provide this guarantee of high standards and protection of public interests. GAO has stated [Proposed rules, December 20, 2004] that GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with public – private competition. If, as stated, GAO will not review the decision to file a protest, safeguards of public interests, accountability to the taxpayers, effective public business have not been met.

Employees have a vested interest in the processes, procedures and outcome of an A76 study. Currently, and with addition of the proposed language, if employees find errors in bidding, selection and evaluation processes, there is no remedy and no other process or procedure to address issues raised. Therefore, the only avenue for redress of procurement process violations is with GAO. The exclusive representative of the employees must be given the opportunity to protest to GAO when an agency has not complied with the applicable procedures in the selection process or that the agency had conducted an evaluation that was inconsistent with the solicitation's evaluation criteria or applicable statutes and regulations.

Thank you for the opportunity to comment on these proposed rules.

William Dougan
President
Forest Service Council
National Federation of Federal Employees

DESIGN PROFESSIONALS COALITION

555 11th Street, NW, Suite 525, Washington, DC 20004
Tel: 202/393-2426 Fax: 202/783-8410

January 26, 2005

Mr. Michael R. Golden
Assistant General Council
Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Subject: Comments on Proposed Rule on Bid Protest Regulations

Dear Mr. Golden:

Thank you for providing the Design Professionals Council (DPC) with the opportunity to comment on GAO's Proposed Rule on Bid Protest Regulations where a public-private competition has been conducted under OMB Circular A-76 as revised on May 29, 2003. DPC is a national organization founded in 1983 to represent the public policy and business interests of the nation's leading engineering, architectural, surveying and mapping firms. Member companies are multi-disciplined, multi-practice firms with both domestic and international operations. They are involved in transportation, infrastructure, water, wastewater, environmental, industrial, and hazardous and nuclear waste projects.

We have reviewed your proposed rule and agree with your approach that the Federal agency official, or Agency Tender Official (ATO), responsible for submitting the Federal agency tender is an "interested party" to file a protest at GAO or entitled to the status on an "intervenor" to participate in a protest filed at GAO. We also concur with your proposal that GAO will not review the decision of an ATO to file a protest (or not to file a protest) in connection with a public-private competition.

DPC consistently has endorsed efforts to reform and update OMB Circular A-76 to ensure that both public and private entities are treated fairly and equally throughout all aspects of these competitions. We approve of the balanced approach put forth in your proposed rule which provides the public entity with the same rights as those provided to the private sector in terms of bid protest rights without creating a situation wherein many individuals could file spurious protests in order to needlessly prevent a contract from being awarded.

Once again, on behalf of DPC, I appreciate this opportunity to submit comments and do not hesitate to contact me if you have any questions or require further clarification on our views.

Sincerely yours,

Richard L. Corrigan
Vice Chairman

A coalition of the American Council of Engineering Companies

1 of 3

February 8, 2005

ReqComments@GAO.gov

Attention:
Michael R. Golden
Assistant General Counsel,
Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

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USGAO

Mr. Golden,
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Comment 1 Interested Party

Proposed change

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Issue with proposed language: In the A76 Circular, appendix B, the number of employees defines when an agency is not authorized to use the **streamlined competitive process**. When more than 65 FTE's are included into the study only a standard study may be conducted. Standard competitions may be conducted when 65 or less FTE's are included into a study.

Appendix B of Circular A76 states:

5.a. An agency shall use a standard competition if, on the start date, a commercial activity is performed by:

- 1. The agency with an aggregate of more than 65 fte's; or

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2 of 3

jurisdiction under CICA to consider a protest. If, however, the protest is now being treated as part of a streamlined A-76 competition, thereby using the procurement system to determine whether to contract out or to perform work in-house, GAO would consider a protest by an interested party alleging that the agency had not complied with the applicable procedures in the selection process or that the agency had conducted an evaluation that was inconsistent with the solicitation's evaluation criteria or applicable statutes and regulations. GAO in the Proposed Rules [December 20, 2004] stated that they intend to follow the Vallie Bray precedent with respect to protests of streamlined competitions conducted under the revised circular. If a standard competition or a streamlined competition withstood the scrutiny of GAO and would allow private interested party(s) to protest, then any interested party including the Agency ATO should have that same right.

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Proposed change

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Issue with proposed language: The language proposed excludes an important check and balance to the public private competition. It does not represent the best interests to the taxpayer. The definition of an interested party must include language that allows for the exclusive representative of the affected employees to be considered as an interested party.

When OMB revised the Circular A76, May 29, 2003, Their summary states quite clearly, "(3) *make agencies accountable to taxpayers for results achieved from public – private competitions, irrespective of the source or sector that performs the work.*" OMB's language clearly states that the purpose of Circular A76 is to provide the taxpayers with accountability irregardless of the source or sector that performs the work. Accountability and safeguards of public interests are also mentioned in Chapter 71 of Title 5 US Code:

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(a) The Congress finds that-

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(b) contributes to the effective conduct of public business, and

(c) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and

~~performance, innovation, and~~
*progressive work practices to facilitate and improve employee performance and
the efficient accomplishment of the operations of the Government.*

What is not defined in either the Statute or OMB's Circular is that only an agency official, such as the ATO will provide this guarantee of high standards and protection of public interests. GAO has stated [Proposed rules, December 20, 2004] that GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with public – private competition. If, as stated, GAO will not review the decision to file a protest, safeguards of public interests, accountability to the taxpayers, effective public business have not been met.

Employees have a vested interest in the processes, procedures and outcome of an A76 study. Currently, and with addition of the proposed language, if employees find errors in bidding, selection and evaluation processes, there is no remedy and no other process or procedure to address issues raised. Therefore, the only avenue for redress of procurement process violations is with GAO. The exclusive representative of the employees must be given the opportunity to protest to GAO when an agency has not complied with the applicable procedures in the selection process or that the agency had conducted an evaluation that was inconsistent with the solicitation's evaluation criteria or applicable statutes and regulations.

Thank you for the opportunity to comment on these proposed rules.

Theresa Weaver
President – Local 271
National Federation of Federal Employees

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February 18, 2005

U.S. GENERAL ACCOUNTABILITY OFFICE
441 G STREET, N.W.
ROOM 1139
WASHINGTON, D.C. 20548
ATTENTION: PROCUREMENT LAW CONTROL GROUP

Re: United States Chamber of Commerce

Dear Sir/Madam:

Enclosed please find an original and two copies of Comments of the United States Chamber of Commerce, Proposed Changes in Bid Protest Regulations Pursuant to Section 326 of The Reagan National Defense Authorization Act of 2005 to the Government Accountability Office. We respectfully ask that you accept the original and one copy for filing with the GAO, date stamp the extra copy and give it to the courier to return to our offices.

Thank you for your assistance in this matter.

Very truly yours,



Stephen M. Sorett
Attorney for
Chamber of Commerce of the United States

SMS:alw
Enclosures

2005 FEB 18 PM 12:36

REC'D 11/18/05

**COMMENTS OF THE UNITED STATES CHAMBER OF COMMERCE
GOVERNMENT ACCOUNTABILITY OFFICE - PROPOSED CHANGES
IN BID PROTEST REGULATIONS PURSUANT TO SECTION 326 OF THE
REAGAN NATIONAL DEFENSE AUTHORIZATION ACT OF 2005**

I. Introductory Statement

The United States Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. The Chamber regularly advocates its members' views before Congress, the courts and regulatory bodies. It initiates and enters litigation involving issues of national concern to the American business community.

Many of the Chambers' members provide goods and services to the United States under government contracts. Many of the Chambers' members are the appropriate and natural recipients of contracts for the performance of functions that were previously performed by personnel within the government; outsourcing and privatization of non-core government functions is an important component of business growth for Chamber members.

Thus, among the Chamber's many roles, one that is particularly important is the promotion of private enterprise, including the use of the private sector businesses to accomplish objectives that are not within the core functions and competency of the Federal Government. While the Chamber recognizes the natural tension that privatization and outsourcing of non-core functions represents for employees of departments and agencies, economic as well as the promotion of private enterprise objectives dictate that decisions made to privatize and outsource, which are important policy determinations, should not be subject to challenge by employees who are not within the policy making offices of those departments and agencies. Not only is allowing such challenges bad policy, it also dilutes unacceptably the authority of the appointed officers and violates primary constitutional principles relating to "execution" of the laws, "appointments" and "separation of powers."

II. Executive Summary

2005 FEB 18 PM 12:36

09/02/05 10:12:36

Section 326 of the Reagan Defense Authorization Act included a provision that allows employees who would be displaced by an outsourcing/privatization decision of the head of the department or agency to file or participate in a "protest" administrative proceeding that would be conducted by the Government Accountability Office ("GAO"). GAO has published for comment revisions to its "protest" regulations that carry into operation the provisions of Section 326.

The practical and operational affect of Section 326 and the proposed regulations is to grant employees of a department or agency, who would be affected by a privatization/outsourcing decision of their superiors, the power to challenge that decision. It is the position of the Chamber that such employees (and their representatives) have no Constitutional authority or standing to lodge such challenges. Congress has no constitutional authority to enable such employees to interfere with policy decisions of Executive Branch Officers to privatize/outsourc functions previously performed by those employees. The provision dilutes impermissibly the authority of the President and other Appointed Officers of the Executive Branch to execute fully and faithfully the laws. It compromises the intended authority contained in the Appointments Clause of the Constitution and violates principles of Separation of Powers by placing Congress in the position of having anointed non-appointed persons employed within the Executive Branch to challenge execution decisions.

If Congress can, by legislation, enable employees of the Executive Branch to challenge (in an adjudicative forum, outside the department or agency) the decisions of their superiors, no policy or execution of law decision by the President and duly appointed lesser officers will be secure from challenge by these employees. This would make policy decisions, exclusively reserved to the President and his appointed officers, utterly impossible. In this particular case, it is understandable that employees who may be displaced by privatization and outsourcing decisions would object, but they simply cannot be allowed avenues of redress that are outside their departments or agencies. The very fabric of the President's execution powers and responsibilities is compromised in such activity. Congress lacks the Constitutional authority to interfere in this manner in the execution of the laws.

III. Analysis

On October 28, 2004, the Congress enacted Section 326 of the FY 2005 National Defense Authorization Act, P.L. 108-375, which amended the Competition in Contracting Act (“CICA”) and provided, in pertinent part, that:

“...[F]or standard competitions [under Office of Management and Budget Circular A-76 or “A-76”] involving 65 or more [Full Time Equivalent] FTEs only, an agency tender official [as that term is used under A-76] who is an interested party for purposes of submitting the Federal agency tender in [an A-76 competition] may file a protest only at the Government Accountability Office (GAO)...At the request of a majority of the employees of the federal agency who are engaged in the performance of an activity or function subject to [the A-76] competition, the official shall file a protest in connection with such [an A-76] competition unless the official determines that there is no reasonable basis for the protest. If the agency tender official [hereafter referred to as the “ATO”] determines not to file such protest, the official shall provide written notification to Congress...In addition, if an “interested party” [presumably other than the ATO] files a protest in connection with such [A-76] competition, a person representing a majority of the employees of the federal agency who are engaged in the performance of the activity or function [such as a union employee or counsel for a union] may intervene in that protest...”

On December 20, 2004, GAO issued a proposed rule to amend its Bid Protest Regulations to implement Section 326. 69 Fed Reg. 75878. Specifically, in pertinent part, GAO proposes to expand the definition of an interested party to include the ATO for protests arising from A-76 competitions. In addition, GAO proposes to expand the definition of an intervenor to include a person representing a majority of the employees of the Federal agency who are subject to an A-76 competition. Also, GAO proposes to expand the definition of an intervenor to include the ATO. GAO set a deadline of February 18, 2005 to receive comments.

We note that the applicable A-76 provisions themselves leave a great deal to be desired in defining authority where outsourcing and privatization initiatives are being undertaken. Thus, in addition to the very logical presence of a "contracting officer" (who would be generally characterized as a "Procurement Contracting Officer" or "PCO") the A-76 provisions also provide for an "Agency Tender Official" ("ATO"). But it is not at all clear, as between the two, who is the authorized representative of the Department Secretary or Agency Head. Were that not confusing enough, the same A-76 provisions also provide for a "Competitive Sourcing Official" ("CSO") whose derived authority is also unclear. This mélange of authorities becomes germane when the "bid protest" authority is considered because it is the ATO (not the PCO or the CSO) who is given the authority to file a protest. This approach leaves it uncertain whether the filing of a protest, in the first place, represents the decision of the Secretary or Agency Head. If, in any case, it does not, the language suffers the same constitutional infirmities as are reviewed below. It is unlikely indeed that a Secretary or Agency Head would, under logical circumstances, "protest" his/her own decision to outsource/privatize a function previously performed within the Department or Agency.

The United States Chamber of Commerce is concerned about the proposed provisions that enable lesser employees to protest a decision of their superior and expresses its opposition to them. Our concern is based on the fact that the statute and the proposed regulations, on their face, violate Constitutional safeguards pertaining to the Appointments Clause, the Execution ("Take Care") Clause as well as Separation of Powers. Specifically, our concerns are as follows:

1. Regarding the ATO, the Congress does not have the authority to authorize an official in a federal department or agency, who is subordinate to the head of the department or agency (an "inferior officer"), to challenge a decision by the appointed contracting officer of that department or agency. It is to be presumed that the Contracting Officer, and NOT the ATO, has made the decision specified by the Department or agency head.
2. Regarding the ability of a "majority" of employees to challenge a decision by the department or agency contracting officer, the Congress does not have the

authority to authorize those employees, who are subordinate to the head of the department or agency (“inferior officers”), to make such a challenge.

The Constitution establishes that the President is the sole government authority for the "execution" of the laws of the United States. Thus, Article I, Clause 1, recites that

"The executive Power shall be vested in a President of the United States."

And, Article I, Section 3 goes on to recite that the President

"...shall take Care that the Laws be faithfully executed...."

The Appointments Clause of Article II of the Constitution reads as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." [Article II, Clause 2.]

Unquestionably, the ATO and the employees are “inferior” officers and it is well settled that the Congress cannot undermine the authority of the Secretaries of Departments and Agency Heads to execute the laws within their jurisdictions as any such Congressional action would run afoul of the Constitutional limitation on “incongruous” intrabranh appointments.

Here, there can be no question that the ATO and the employees are “inferior” officers under Article II. The test to determine where to draw the line between “inferior” officers and “principal” officers was clearly articulated by the U.S. Supreme Court in *Morrison v. Olson*, 487 U.S. 654 (1988) when it examined several factors in deciding whether or not Independent Counsels appointed pursuant to the Ethics in Government Act violated Constitutional limitations.

In concluding that the mechanism for appointing Independent Counsel did not violate Constitutional limitations the Court found:

“First, appellant is subject to removal by a higher Executive Branch official...Second, [the Independent Counsel] is empowered by the Act to perform only certain, limited duties...Third, [the Independent Counsel’s] office is limited in jurisdiction...[and] has no ongoing responsibilities that extend beyond the accomplishment of the mission ...appointed for and authorized...to undertake.”

Having established that the ATO and the employees are “inferior” officers, the inquiry then must turn to whether the Congress had the power to “appoint” him, vest him or her with the authority to “appeal” a policy determination of an Article II officer and, under the circumstances here, do so without any possibility of “removal.” This would be an impermissible, incongruous “intra branch appointment.” First, the Supreme Court in *Morrison* recognized that the Constitution textually allows only Department Heads to appoint “inferior officers” without meddling or interference from the Congress, but it went on to say that “...there is no absolute requirement to this effect in the Constitution...[However, w]e do not mean to say that the Congress’ power to provide for intrabranh appointments of ‘inferior officers’ is unlimited.”

The Supreme Court then applied a balancing test and decided that the Congress did not violate Constitutional standards regarding the Independent Counsels because there was no “incongruity between the functions normally provided by the courts and the performance of their duty to appoint the Independent Counsel.” In the instant case, Congress has reached into the affairs of the department or agency for the precise purpose of “appointing” a lesser officer to question the execution decisions of the appointed officer, and, not only to question but to pursue that questioning in an administrative appeal outside the department or agency itself.

Further, unlike *Morrison*, the appointed official has no authority whatsoever either to remove the lesser official or to control in any way the offending conduct. Such lesser officials are undoubtedly subject to Civil Service protections particularly here because they presumably would be performing Congressionally mandated or permitted functions. The absence of the ability of the appointed officer to control the conduct of the lesser officer - alone - makes this

provision unconstitutional. (*See Ridenour ex rel U.S. v. Kaiser-Hill Co., LLC*, 10th Cir. decided 2/9/05).

In *Morrison*, the Supreme Court then turned to Separation of Powers and observed that "...this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch:

"Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a 'dange[r] of congressional usurpation of Executive Branch functions.'" 478 U.S., at 727..."

In the instant case, it would be hard to imagine a function more central to the Executive Branch Officer's Article II "faithfully execute" powers than a decision to outsource/privatize an operations previous performed within his department or agency.

In *Morrison*, the Supreme Court noted that "...once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel...the various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch." Second, "The Act...gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy...Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."

The facts in the instant case are exactly opposite. Congress has created these lesser officers for the precise purpose of enabling the questioning of the execution function by the superior officer. The superior officer has no power of removal of these lesser officers and no ability whatsoever to control their activity in opposing the officer's decision making. Worse yet, the oppositional structure thus created, at least in the case of the employee representative, has no

purpose other than to advance the individuated interests of the representative and his supporters in opposition to the department or agency decision.

The approach presented by the Supreme Court in *Morrison* has been amplified in litigation pertaining to the qui tam provisions of the False Claims Act (“FCA”), especially in *U.S. v. Boeing Company*, 9 F.3d 743 (9th Cir. 1993). The Court in *Boeing* noted:

“The Supreme Court has recognized that the separation of powers doctrine can be violated by ‘provisions of law that *either* accrete to a single Branch powers more appropriately diffused among separate Branches *or* that undermine the authority and independence of one or another coordinate Branches.’ *Mistretta*, 488 U.S. at 382...It is the second kind of violation that is at issue in this case...The Supreme Court has established that where an act of Congress arguably threatens the integrity of another branch’s authority and independence, the proper separation of powers inquiry is whether Congress has ‘impermissibly undermined’ the role of that Branch...In other words, we must consider whether the qui tam provisions ‘disrupt [] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’ *Morrison*, 487 U.S. at 695...[W]e must decide whether ...these provisions accord the Executive Branch ‘sufficient control’ over the conduct of relators to ‘ensure that the President is able to perform his constitutionally assigned duties.’”

The *Boeing* court then proceeded to provide the following analysis”

“Under the FCA, the Executive Branch can control a qui tam relator’s exercise of prosecutorial powers in several ways. The government can intervene in a case and then take primary responsibility for prosecuting the action: it can seek judicial limitation of the relator’s participation; it can move for dismissal of

a case which it believes has no merit, after notice to the relator and an opportunity for a hearing; it can seek a judicial stay of the relator's discovery regardless of whether it intervenes; and it remains free to seek any alternate remedies available, including through any administrative proceeding...[W]e do not deny that the qui tam provisions of the FCA to some degree diminish Executive Branch control over the initiation and prosecution of a defined class of civil litigation. Nonetheless, we find that the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels. Thus, the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns."

With the above in mind, we turn to the question of whether the Congress in enacting Section 326 provided sufficient "controls" to the Heads of Departments or agencies over the ATO or employees to pass constitutional muster.

First, if the ATO files a protest at GAO and the Department Head, through the contracting officer or on his or her own representative, disagrees with the position of the ATO, the Congress has not provided for a mechanism to "control" the actions of the ATO; given that the authority is statute-granted, there is little or no possibility that the ATO could be "removed" and, as noted above, the ATO would undoubtedly be protected by Civil Service safeguards. Second, while the Department Head, through the contracting officer or on his or her own, can theoretically seek judicial limitation of the role or actions of the ATO, neither the Congress nor GAO has indicated the circumstances when or the procedures how this might occur; for all intents and purposes, the ATO is absolutely free to take whatever position (in opposition to that of the Department or Agency) he thinks advisable.

Third, while the Department Head, through the contracting office or on his or her own, can move for the case's dismissal at GAO, no such procedure is provided in the proposed regulations and it can be argued that any such procedure would actually defeat the purposes of the statute. The situation presents the awkward scenario where counsel for the ATO

(presumably from the department or agency) is adverse to counsel for the contracting officer (from that same department or agency). Again, neither the Congress nor GAO has provided any guidance as to how to handle this eventuality. Fourth, while the Department Head on his or her own can attempt to seek a judicial stay regardless of whether it intervenes, it is unlikely such an action would prevail as there likely will be no case or controversy with the Department Head, in effect, suing one of his or her own "inferior officers." Fifth, while it is possible that the Department Head can seek alternate remedies, neither the Congress nor GAO has provided any substantive or procedural guidance on this point.

With respect to the case of the employees, the question is even clearer that there are no means of controlling the employees. First, because of Civil Service protections, the Department Head cannot remove them from their positions and Congress did not place any limitations on their status following the "election" to determine the will of the majority of the employees. Hence, it is doubtful that any action by the Department Head will control the actions of disappointed employees who want to exercise their newly found rights under Section 326. Second, it is doubtful that the Department Head can take any steps to stop the employees from proceeding or the ATO from moving forward, as Section 326 allows for no discretion on the part of the Department Head or ATO. Moreover, Section 326 provides for no mechanism for governing the election to determine the majority of employees or for repeated elections (as occurred in the Forest Service matter that gave rise to the Congressional decision to enact Section 326). Hence, even if the Department Head tried to stop an "election", it would be virtually impossible to fathom what procedural steps he or she would have to take to do so.

Third, while the Department Head could move for dismissal of the case at GAO, where an ATO is acting on behalf of the employees (or on his/her own), the scenario could easily result in the ATO representing the MEO as well as the majority of the employees while concurrently the Department Head appears on his or her own as well as through the contracting officer. This has the potential for a matter quickly becoming a procedural and substantive quagmire. Fourth, the same problem presents itself regarding the case or controversy problem should a Department Head decide to pursue legal action to control the ATO acting as a representative of the majority of the employees. Fifth, as in the case of the ATO acting on behalf of the MEO, neither the

Congress nor GAO have provided any guidance as to how the Department Head might pursue alternate remedies.

It is entirely possible that the contemplated proceedings before the GAO would pit the employees against the ATO, the ATO against the PCO, and a protesting contractor against all of the above. This is not only a juridical Tower of Babel it is the epitome of violation of the Take Care and Appointments clauses of Article II and a text book example of the violation of Separation of Powers limitations.

CONCLUSION

The statute, Section 326, is facially unconstitutional. The attempt to implement its provisions in the proposed GAO regulations is equally unconstitutional. The contemplated procedures impossibly dilute the authority of the Department or Agency head and create a constitutionally unworkable scheme. The decision to outsource or privatize a previously government performed function is a classic example of a policy determination given over to the exclusive authority of Executive Branch appointed Officers. That lesser officers, unappointed employees or their representatives, could be empowered by Congress to stymie this decision-making presents an impermissible attack on separation of powers.

The Regulations should not be placed in operation and, at a minimum, the opinion of the Attorney General on the constitutionality of Section 326 should be sought.

DN:32064648.2



Council 26/AFSCME

RECEIVED
USGAO

PM 4:48

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SAUL SCHNIDERMAN
President
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Vice President
GWENDOLYN EPPS
Treasurer
C. DAVID SALLAS
Secretary

February 14, 2005

VIA FAX: (202) 512-9749

Michael R. Golden
Assistant General Counsel
Government Accountability Office
411 G Street, NW
Washington, DC 20548

RE: Comments on Protest Regulations

Dear Mr. Golden:

CARL GOLDMAN
Executive Director
ERNIE POND
Business Manager
JOANNE G. PETERSON
Office Manager
DON MADDREY
Council Representative
JAY L. POWER
Council Representative
BETH MacBLANE
Organizer
FERN O. FINLEY
Organizer
IVY E. CHISLEY
Office Assistant

On behalf of the 10,000 federal employees represented by AFSCME Council 26, I am submitting the following in response to the Government Accountability Office's (GAO) request for comments published in the January 5, 2005 edition of the Federal Registrar.

According to the GAO's proposed regulation and corresponding legislation, the Agency Tender Official (ATO) must file a protest if requested by a majority of the workers unless he/she "determines that there is no reasonable basis for the protest." However, the proposed rule and the legislation do not address the meaning of the word "reasonable". It is our strong recommendation that the regulation should include criteria for determining what is or is not considered a "reasonable" basis for a protest.

The new legislation also requires the ATO to "provide written notification to Congress" whenever he/she determines that a requested protest is unreasonable. But the law and GAO's proposed rules do not describe what must be included in the written notification. The regulations should require that the ATO address in detail whether the protest is reasonable or not, based on the criteria we recommend should be established.

Further, it is noted that the proposed regulations do not state who in Congress should receive the written notification. It is our recommendation that the regulations be made more specific on this point.

Finally, AFSCME Council 26 believes that neither the proposed regulations or the corresponding legislation provide a level playing field for federal employees, because even with the proposed changes, federal employees will seldom be able to file protests.

in the public service

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
(AFL-CIO)**



Thank you for considering my comments and should you need additional information please contact me at (202) 393-5757.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Goldman", with a long horizontal flourish extending to the right.

Carl Goldman
Executive Director
AFSCME Council 26

THE FAIR COMPETITION COALITION

February 18, 2005

Mr. Michael R. Golden
Assistant General Counsel
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

RE: Government Accountability Office, Administrative Practices and Procedure, Bid Protest Regulations, Government Contracts

Dear Mr. Golden:

The Fair Competition Coalition (FCC) appreciates this opportunity to provide comments on the proposed rule issued by the Government Accountability Office (GAO) on its Bid Protest Regulations for Government Contracts (Federal Register, Vol. 69, No. 243, December 20, 2004).

The Fair Competition Coalition is a broad-based coalition of dozens of organizations representing tens of thousands of companies of all sizes and the workers they employ. The FCC supports a performance-based, results-oriented Government and a fair, efficient competition process.

The Congressionally mandated Commercial Activities Panel, chaired by the Comptroller General, recognized the importance of balancing the rights and responsibilities of participants in the competitive sourcing process. Under the revised Office of Management and Budget (OMB) Circular A-76, public-private competitions are now conducted under processes largely based upon the Federal Acquisition Regulations (FAR). This is intended to facilitate fair and thorough consideration of offers from Government and private sector teams. Since the May 2003 revisions to OMB Circular A-76, the question has been raised as to whether and who should represent the Government's Most Efficient Organization (MEO), and has the right to file bid protests with the General Accounting Office (GAO)

Last year, GAO published a notice in the Federal Register (June 13, 2003) requesting comments on numerous issues GAO identified as applicable to its bid protest regulations. Several FCC members submitted comments in response to that notice. GAO also addressed some of these issues in three bid protest cases in early 2004 that were brought by Federal employees challenging agency A-76 award decisions. From these actions, the FCC believes that GAO already has developed a sufficient body of knowledge to assist it in moving forward with the necessary regulatory and procedural changes to implement congressional intent as expressed in Section 326 of the FY05 National Defense Authorization Act (P.L. 108-375).

Therefore, we commend the GAO for expeditiously issuing this proposed rule to gather comments on implementation of Section 326. That provision amends the Competition in Contracting Act (CICA) to grant standing, as interested parties, to the Federal agency tender official (ATO) to file a protest with the GAO in public-private competitions, involving 65 or more full-time equivalent Federal employees, that are conducted under the Office of Management Budget Circular A-76. We concur in your approach to implement Section 326. We also support your proposal to not review the decision of an ATO to file (or not file) a protest with GAO following the results of a public-private competition.

Again, the members of the FCC appreciate this opportunity to comment on your proposed bid protest regulation. Please contact Alan Chvotkin of the Professional Services Council (703-875-8059), or Cathy Garman of the Contract Services Association (703-243-2020) should you need any further information from the coalition.

Sincerely,

Aerospace Industries Association Airport Consultants Council* American Congress on Surveying and Mapping* American Council of Independent Laboratories* American Council of Engineering Companies * American Electronics Association* American Institute of Architects* Associated General Contractors of America* Business Executives for National Security* Construction Management Association of America* Contract Services Association of America* Design Professionals Coalition* Electronic Industries Alliance* Information Technology Association of America* Management Association for Private Photogrammetric Surveyors* National Association of RV Parks and Campgrounds* National Defense Industrial Association* Professional Services Council* Small Business Legislative Council* Textile Rental Services Association of America* The National Auctioneers Association*United States Chamber of Commerce*



PROFESSIONAL SERVICES COUNCIL

February 18, 2005

Mr. Michael K. Golden
Assistant General Counsel
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Via email: RegComments@gao.gov

Re: Administrative Practice and Procedures Bid Protest Regulations, Government Contracts

Dear Mr. Golden:

The Professional Services Council (PSC) is pleased to submit these comments in response to the proposed revisions to the Government Accountability Office's (GAO) bid protest regulations published in the Federal Register on December 20, 2004 (69 F.R. 75878) and amended on December 23, 2004 (69 F.R. 76979). These revisions implement the amendments to the Competition in Contracting Act (31 U.S.C. 3551, et. seq.) relating to GAO's bid protest jurisdiction made by Section 326 of the fiscal year 2005 National Defense Authorization Act (P.L. 108-375).

As you know, the Professional Services Council (PSC) is the leading national trade association that represents more than 170 companies of all business sizes providing professional and technical services to virtually every federal agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental and social sciences. PSC has been an active participant in the congressional and public debates on the proper policy for granting federal agency tender officials (ATOs) and others in the public sector access to the bid protest system. We also submitted extensive comments to GAO on July 16, 2003¹ in response to GAO's request for comments. Today, we also joined with other association members of the Fair Competition Coalition in submitting an additional set of comments on these proposed rules.

¹ Available at: <http://www.pscouncil.org/pdfs/PSCGAOA76ProtestCommentsJuly162003.pdf>

INTRODUCTION

Congress carefully considered the options for providing expanded bid protest jurisdiction at the GAO and developed an appropriate and rational balanced approach by striving to treat all bidders equally while still giving limited but meaningful access to the designated representative of federal employee competitors. While PSC, like many others, supported a different formulation during the legislative process, we evaluate the GAO proposed rule and related issues against the law Congress passed, not against what we prefer they would have enacted.

Against that standard, we believe that the core proposed changes to the bid protest regulations to be incorporated in 4 CFR 21.0 and 21.5 comply fully with the statute and should be adopted but with the changes we recommend.

PART 21 REVISIONS

GAO proposes to revise two sections of 4 CFR Part 21, the Bid Protest Regulations. We support the GAO revisions with the following suggestions.

Definitions (Proposed 4 CFR 21.0)

In the proposed revision to the Definitions in 21.0(a)(2), we recommend the addition of the parenthetical phrase “(the “agency tender official”)” before the phrase “is also an interested party.” While we recognize that the statute did not use the term “agency tender official” in this portion of the CICA amendment, Congress did use that term without further definition elsewhere in the statute, and GAO uses that term in new Part 21.5. Including this additional parenthetical phrase here would add clarity and consistency to the GAO regulations by making it clear that there is only one entity representing the federal workforce offer that could qualify as an “interested party.” It is also clear that the statute did not grant the agency tender official automatic standing as an interested party in every protest affecting that workforce and that even the ATO must meet the other eligibility criteria under GAO’s existing bid protest regulations.

In the proposed revision to the Definitions in 21.0(b)(2), we recommend including the word “only” as a modifier before the phrase “a person representing a majority of the employees of the Federal agency.” Section 326(c) of the Act and the legislative history are clear that there is only one entity that is granted standing to intervene in a protest otherwise properly filed at GAO – a person representing a majority of the affected employees. Including this additional word here would add clarity and consistency to the GAO regulations on the important point that only one person could qualify as the “representative” of the affected workforce. Below we also recommend that GAO provide additional guidance on the proof that will be required for a party to assert its role as the representative of the workforce entitled to intervenor status.

Protest Issues Not for Consideration (Proposed 4 CFR 21.5)

As GAO noted in the Supplemental Information accompanying the proposed rule, Section 326(b) of the 2005 National Defense Authorization Act provides, and GAO proposes to include in proposed 4 CFR 21.5, a provision that GAO will not review the decision of an agency tender official to file a protest or not file a protest in connection with a public-private competition. We support this interpretation and application of the statute.

However, in the proposed revision to the new Part 21.5, we recommend adding before the period at the end of the new text the phrase “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 statute addressed only a subset of all public-private competitions and this subset should be explicitly reflected in the regulations. We recognize that GAO’s existing regulations include other factors that establish a basis for denying consideration of a protest, which GAO should continue to apply to these protests as well.

OTHER PROCEDURAL MATTERS

In the Supplementary Information accompanying the proposed rule, GAO identified two additional matters on which comments were solicited. We are pleased to comment on them.

Exhaustion of Remedies Not Required

GAO proposes to apply to these A-76 protests the same rule relating to exhaustion of remedies as GAO applies to non-A-76 protests, that is, that no exhaustion is required. We concur in that policy and believe that protests permissibly filed relating to A-76 public-private competitions should not be required to first exhaust administrative remedies. However, we urge GAO to be explicit about the limited scope of all A-76 protests that are covered – namely, only those protests filed by an “interested party” pursuant to a solicitation that is “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.” This clarification will limit the expense and amount of protest arguments designed to test GAO's intent in this regard.

Streamlined Competitions

GAO also addressed the scope of its jurisdiction regarding streamlined competitions conducted under the May 2003 version of OMB Circular A-76. A streamlined competition under the Circular is reserved for functions involving 65 or fewer FTEs and that typically (but not exclusively) does not involve the agency’s use of a solicitation. The OMB Circular provides that no party may administratively contest an agency’s award determination. In Vallie Bray,² GAO concluded that where a streamlined

² Vallie Bray, B-293840 and B-293840.2, March 30, 2004, 2004 CPD ¶ 52.

competition is conducted without utilizing a competitive solicitation, GAO lacks jurisdiction under CICA to consider a protest from any party – public or private -- in such matter. We recognize that this holding is consistent with GAO's longstanding requirement for utilization by an agency of a solicitation as a basis to trigger GAO's CICA jurisdiction.³ In Vallie Bray, GAO also concluded that if an agency used a competitive solicitation to determine whether to contract out or to perform work in-house, GAO would entertain a protest by an interested party alleging that the agency failed to comply with its own procedures, assuming all other GAO jurisdictional and reviewability requirement standards are met. While we regret that the effect of the Vallie Bray holding is to leave a potentially significant subset of A-76 “competitions” without a process for any party to challenge an unreasonable agency decision, we concur with GAO that this is the proper effect of the confluence of the Circular’s administrative provisions and the authority CICA granted to GAO.

ADDITIONAL PSC RECOMMENDATIONS

In addition to the specific areas covered in the proposed rule and addressed above, GAO solicited comments on the additional area of protective orders. We are pleased to address that topic and to make two other suggestions for changes to the bid protest regulations.

Treatment of the “Intervenor” Under A Protective Order

The statute and proposed regulations present a new issue for GAO’s attention – how to treat a federal employee who is qualified as the “representative” of the workforce under a protective order if one is required. Under its current practice, GAO does not require a federal employee to sign a non-disclosure agreement to gain access to information covered by a protective order since the Federal Trade Secrets Act (18 USC 1905) is already applicable to federal employees operating on behalf of the agency. However, here the representative of the workforce may be a federal employee but is operating as a competitor in the process. In such cases, we believe GAO should treat the representative of the workforce who qualifies for intervenor status in the same manner as any other interested party seeking access to protected information, and to refrain from granting access to anyone with “competitive decision-making” responsibilities. This same standard, enunciated for outside counsel in US Steel, should be equally applied here, too. Nothing in the CICA amendments or any other act lowered or changed the standard for access to protected information, and we do not believe GAO should create any new standard simply because the additional party that may qualify as an intervenor is a federal employee or an outside designated representative of the federal workforce. We also recommend that GAO state the sanctions that apply to a breach of the protective order in either the bid protest regulations or in GAO’s Descriptive Guide.

The May 2003 revisions to the Circular reinforce the concept of treating the agency tender like every other offer, to the maximum extent practical. In our view, it would be a huge deterrent for private contractors if they knew that those government employees

³ Trajen, Inc., B-284310, Mar. 28, 2000, 2000 CPD ¶ 61 at 3 (GAO reviews protest because the agency utilized an RFP to conduct an A-76 study)

involved in putting together the agency tender could gain access to their proposal or could gain insight into their bid strategy through information disclosed by the ATO or a "representative" of the workforce. Such access would give the agency tender a huge unfair competitive advantage in any re-competition following the protest.

Require Proof of Status of an Intervenor

Since the "standing" of an "intervenor" as the person representing a majority of the affected workforce in a covered A-76 study is jurisdictional to GAO's authority, GAO must establish some procedural standards for determining who qualifies as an intervenor. The statute provides no such guidance. In a bid protest case presented to GAO last year,⁴ this element was not an issue since the protestor provided to the agency as part of its administrative challenge and the GAO as part of its protest contemporaneously signed statements from an overwhelming number of the affected workforce designating Mr. Duefrene as their "representative" for purposes of the agency challenge and protest. Future cases may not be so clear-cut as to timing of the designation, the percentage of the affected workforce making the designation, or the certainty of the individual selected as the representative. All parties to the protest are entitled to know that only "interested parties" will be able to participate in the proceedings. All parties to the protest are also entitled to know their respective rights and responsibilities during and after a protest proceeding, including whether coverage under a protective order is warranted and available. PSC urged GAO to address this important procedural requirement in our October 26, 2004 letter to GAO General Counsel Gamboa,⁵

Include an Effective Date

The statute is explicit that the amendments to GAO's bid protest regulations become effective for new studies initiated under OMB Circular A-76 ninety days after enactment of the statute. We recommend that GAO state explicitly this jurisdictional criterion and include the date certain of the effective date in any final rule GAO issues.

Notification of ATO of Filed Protest

Currently, 4 CFR 21.3(a) includes the requirement to notify the "contractor" of the protest if award has already been made. We recommend amending this section to also require notice to the ATO if the protest involves a covered A-76 matter. We also raised this matter in our October 26, 2004 letter to GAO General Counsel Gamboa.⁶

⁴ Dan Duefrene, et.al. B-293590.2, et.al., April 19, 2004

⁵ Available at: <http://www.pscouncil.org/pdfs/GAOA76Letter26Oct04.pdf>

⁶ Id.

CONCLUSION

We commend GAO for expeditiously publishing proposed rules to implement this important statutory change in your Bid Protest Regulations. We endorse the proposed rule while making suggestions for revisions that we believe will add to the clarity and effectiveness of the regulations. Thank you for the opportunity to submit these comments. We welcome the opportunity to discuss these comments with you further at your convenience. If you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,



Alan Chvotkin, Esq.
Senior Vice President and Counsel

cc: Dan Gordon, Esq., GAO



February 18, 2005

Mr. Michael R. Golden
Assistant General Counsel
Government Accountability Office
441 G Street, NW
Washington, DC 20548

RE: *Federal Register* Notice Requesting Comments on GAO's
Proposed Revisions to Its Bid Protest Regulations

Dear Mr. Golden:

I am writing on behalf of the approximately 150,000 federal employees represented by the National Treasury Employees Union (NTEU) to express our views on the proposed changes to the Government Accountability Office's (GAO) bid protest regulations. GAO has proposed changes to its regulations to implement the requirements of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, 118 Stat. 1811 (Oct. 28, 2004) ("Reagan Act"). Thus, the proposed regulations deal with the impact on GAO's bid protest procedures of new rights granted to certain individuals affiliated with the in-house bid in a public-private competition. As shown below, NTEU believes the regulations fail to implement the provisions of the Reagan Act in a fair, equitable, and comprehensive manner.

1. Background

The issue of whether an individual may pursue a bid protest on behalf of the in-house bid in a public-private competition is a contentious one that has been the subject of much litigation. Federal employees and their unions have repeatedly attempted to bring bid protests both before GAO and in the Court of Federal Claims (CFC). Unfortunately, they have been denied standing in both forums, as GAO and the CFC have determined that neither federal employees nor their unions are "interested parties" within the meaning of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56.

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In June 2003, GAO announced that it intended to re-examine this issue. Its re-examination was spurred by the massive revision to the Office of Management and Budget's (OMB) Circular No. A-76. That circular establishes the procedures for conducting public-private competitions in the federal government. GAO solicited comments on whether the changes to A-76 resulted in federal employees now satisfying the "interested party" standard.

Before GAO responded to the comments it had received, a federal employee and his union filed a bid protest. See Matter of: Dan Duefrene; Kelley Dull; Brenda Neuerberg; Gabrielle Martin, B-293590.2; B-293590.3; B-293883; B-293887; B-293908. Despite compelling evidence that the revisions to the circular had transformed federal employees and their unions into "interested parties," GAO held that the union and employee still did not satisfy the statutory definition and, therefore, lacked standing to pursue the protest.

NTEU, which filed a statement in support of the protesters in that case, believes GAO's decision is erroneous and that GAO has the statutory authority to hold that federal employees and their unions satisfy the interested party standard as a result of the changes to the public-private competition rules imposed by the revised circular. By ruling the other way, GAO left in place a one-sided process in which only disappointed private bidders could bring bid protests.

In recognition of this imbalance, the Comptroller General urged Congress to consider taking legislative action to make clear that the in-house bidder has access to the bid protest process. Congress responded by including new bid protest language in the Reagan Act. Thus, it conferred "interested party" status on the "agency tender official" (ATO) of an in-house competitor in a public-private competition, allowing the ATO to file bid protests with GAO. This purported solution is wholly inadequate.

The ATO is an agency manager who, by definition, is performing "inherently governmental functions" and, accordingly, can never be displaced by a private contractor. Thus, the ATO lacks the personal financial stake in the competition that would give him an incentive to pursue a protest. Indeed, there is a strong professional disincentive for the ATO to file a bid protest. The filing of a protest, at a minimum, creates more work for the agency. It can also, to the dismay of higher-

Mr. Michael R. Golden
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ranking agency officials, cause a delay in implementation of a contract award. See 31 U.S.C. §§ 3553(c)-(d). Moreover, if the ATO were to pursue a protest, he or she would have to point to some error in the public-private competition made by a fellow (often superior) agency manager. As a practical matter, agency managers would be very hesitant to question publicly the way a fellow manager carried out a competition.

It follows that the bid protest language in the Reagan Act is just an empty gesture. The only way to level the playing field between the private sector and in-house bidder is to allow the federal employees who stand to lose their jobs if they lose the competition to file their own protests. They are the only people associated with the federal bidder who possess an economic incentive to pursue justice that matches that of a disappointed private bidder. NTEU urges the Comptroller General to reconsider its views on bid protest standing for the in-house bidder and to continue to prod Congress to enact any necessary legislation to correct this inequity.

2. Comments on the Proposed Regulations

GAO has now solicited comments on proposed regulations to implement the Reagan Act's bid protest provisions, inadequate as those provisions may be. The Reagan Act left open many issues to be resolved through regulation. Unfortunately, GAO's proposed regulations fail to provide adequate resolution of all of those matters. The three major shortcomings of the proposed regulations are discussed below.

a. Identifying the employee representative. Under 31 U.S.C. § 3552(b)(1), the ATO is required to file a protest, unless there is no reasonable basis to do so, upon request of the "majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition." Similarly, under 31 U.S.C. § 3553(g), "a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition may intervene in protest."

Congress did not specify who would serve as the employee's representative for these purposes. GAO's proposed regulations are also silent on this issue. NTEU urges GAO to state in its final regulations that the head of a federal labor organization representing a majority of the federal employees "engaged in the

performance of the activity or function subject to the public-private competition" should automatically be deemed to be the employee representative. This is a practical, administratively convenient, and fair solution that will facilitate involvement of the employees in a process with very tight deadlines. See 4 C.F.R. § 21.2(a)(2) (requiring protests to be filed within 10 days of when the basis for the protest becomes known or should have become known). It will also avoid confusion and wasteful litigation over the identity of the representative.

If no labor organization represents a majority of the affected federal employees, then GAO should create uniform procedures for identifying the person who may intervene on behalf of them. These procedures, when established, should be subject to notice and comment.

b. Impact of the employee representative's right to participate. GAO chose not to propose any modifications to its bid protest regulations addressing the impact of the new role of the employee representative. Specifically, the proposed regulations do nothing to facilitate the employee representative's making of an informed judgment on whether to request that the ATO file a protest. In its final regulations, GAO should make clear that the employee representative is to be provided with all information that any potential protester is entitled to receive and is to have the right to participate in any debriefings, subject to any appropriate measures to protect the confidentiality of sensitive procurement information. That is the only way that this new statutory right can be exercised in any meaningful way.

c. Streamlined competitions. In its *Federal Register* notice (at 75879), GAO states that it has decided to allow bid protests in so-called "streamlined competitions" when the agency has issued a solicitation. Under OMB Circular A-76 (Att. B, A.5.b), an agency can hold a streamlined competition if 65 or fewer employees are involved. Congress, however, has only granted bid protest standing to the ATO in competitions involving more than 65 federal employees. See 31 U.S.C. § 3551(2)(B). Accordingly, not even the ATO would have standing to file a protest in any streamlined competition, whereas, under GAO's interpretation, disappointed private bidders could file a protest in a streamlined competition in which the agency had issued a solicitation.

Mr. Michael R. Golden
February 18, 2005
Page 5

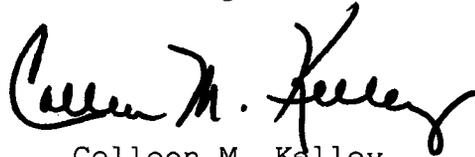
Congress's decision to limit the ATO's bid protest rights to competitions involving more than 65 employees indicates that it did not intend for there to be protests filed in connection with streamlined competitions. GAO's final regulations, therefore, should eliminate any right for disappointed private bidders in a streamlined competition to file a bid protest. This would be consistent with congressional intent and eliminate the disparity between the in-house and private sector bidders in streamlined competitions.

If GAO chooses not to eliminate protests in streamlined competitions, its final regulations should make clear that the right to intervene conferred on the employee representative applies in those cases as well. Unlike the ATO's bid protest power, Congress did not limit the right of intervention to protests concerning competitions involving 65 or more federal employees. See 5 U.S.C. § 3553(g). The final regulations should implement this statutory provision.

* * * * *

Thank you, again, for the opportunity to submit our views on these critical issues. I appreciate the Comptroller General's concern about inequities in the bid protest procedures and hope that he will continue to work with Congress to correct them.

Sincerely,



Colleen M. Kelley
National President

Michael R. Golden
Assistant General Counsel,
Government Accountability Office
441 G Street, N.W.
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RegComments@GAO.gov

February 17, 2005

Mr. Golden,

Thank you for the opportunity to provide comments for consideration in regards to GAO's Proposed Rules, Federal Register, Vol. 69, No. 243, dated Monday, December 20, 2004 which proposes to amend GAO's Bid Protest Regulations as they relate to the results of public-private competitions under OMB Circular A-76, May 29, 2003.

I will address three issues associated with the proposed language in 21.0 Definitions, under PART 21-BID PROTEST REGULATIONS:

- ISSUE 1 - Limiting protests to only those A-76 public-private competitions which involve more than 65 full-time equivalent employees;
- ISSUE 2 - Limiting government interested party status to only the agency tender official (that is, excluding affected employees, exclusive representatives, and other agencies which submit bids); and
- ISSUE 3 - Limiting, or preventing, the ability of an exclusive representative to fulfill its obligations under Chapter 71 of Title 5 of the US Code.

I will offer an alternative definition which would rectify these limitations.

The proposed rule change lists the following definition:

21.0 Definitions.

(a)(2) 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, the official responsible for submitting the Federal agency tender is also an *interested party*.

Suggested new definition:

21.0 Definitions.

(a)(2) In standard public-private competitions conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency, the agency tender official who submitted the agency tender, a single individual appointed by a majority of directly affected employees as their agent or the exclusive representative of directly affected employees; a private sector offeror; or the official who certifies the public reimbursable tender are interested parties.

BASIS FOR CHANGING THE DEFINITION:

ISSUE 1 - Limitation of what studies can be protested - A standard competition is required when an activity is competed if more than 65 full-time equivalent employees are involved. Either a standard or streamlined competition is required when an activity is competed if 65 or fewer full-time equivalent employees are involved. Thus, standard competitions may be conducted for any activity without regard to the number of full-time equivalent employees involved. Protests should be allowed for ALL standard competitions, not arbitrarily just for those involving more than 65 full-time equivalent employees.

ISSUE 2 - Limitation of who can protest - Under the proposed rules, only private sector offerors and the agency tender official are allowed to protest the outcome of a competition to GAO.

The A-76 Policy states in part: ... To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition. And must ... Comply with procurement integrity, ethics, and standards of conduct rules, including the restrictions of 18 U.S.C. § 208, when performing streamlined and standard competitions. Also, to the degree feasible, there must be a level playing field for all competitors who submit a bid in a standard competition.

By not allowing a single individual appointed by a majority of directly affected employees as their agent, or the exclusive representative of directly affected employees, to file a protest with GAO, the ability of the American people to receive maximum value for their tax dollars becomes limited. As well, this limitation removes a check that can insure that competitions under A-76 comply with procurement integrity, ethics, and standard of conduct rules and that mistakes that are made in the competition process can be discovered. Directly affected employees have a direct economic interest in the outcome of a competition and must have the opportunity to review the competition process to insure mistakes were not made.

ISSUE 3 - Limitation on employees' rights under Title 5 USC Chapter 71 - OMB Circular A-76, 5. Scope. e. states: This circular shall not be construed to alter any law, executive order, rule, regulation, treaty, or international agreement.

The United States Code, Title 5, Chapter 71 establishes that the right of employees to organize, bargain collectively, and participate through labor organizations, among other things, safeguards the public interest and contributes to the effective conduct of public business.

Prohibiting employees, through their exclusive representative, from the protest process for A-76 competitions violates their rights under Chapter 71 and inhibits their ability to safeguard the public interest and contribute to the effective conduct of public business.

The suggested change in definition rectifies all three of the issues presented here.

The suggested definition also is consistent with the definitions in OMB Circular A-76.

Thank you for the opportunity to comment on these proposed rules.

Dennis Reichelt
Regional Vice President, Region 6
Forest Service Council
National Federation of Federal Employees



National Federation of Federal Employees

Affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO

1016 16th Street, NW, Washington, DC 20036 (202) 862-4400 (202) 862-4432 (Fax)

Richard N. Brown, President/DBR

John M. Paolino, Secretary-Treasurer

VIA FACSIMILE and ELECTRONIC MAIL

February 16, 2005

Michael R. Golden
Assistant General Counsel
General Accounting Office
441 G Street, NW
Washington, DC 20548

RE: Comments to Federal Register Notice, Vol. 69, No. 243 (December 20, 2004)
Administrative Practice and Procedure, Bid Protest Regulations, Government
Contracts

2005 FEB 16 PM 3:17

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USGAO

Dear Mr. Golden:

On behalf of the National Federation of Federal Employees, FD-1, IAMAW, we respectfully submit the following comments in response to the notice posted in the Federal Register referenced above (hereinafter "Notice"), which pertains to proposed revisions to the General Accounting Office's (GAO) Bid Protest Regulations to implement the National Defense Authorization Act for Fiscal Year 2005 (Authorization Act). We are the exclusive representatives and counsel representing Dan Duefrene in B-293590.2 which resulted in your unprecedented action requesting Congressional amendment of the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556 to allow federal employees standing in the GAO bid protest process.

According to the Notice, we understand that GAO will propose that the official responsible for submitting the federal agency tender in a public-private competition (agency tender official or ATO) conducted under OMB Circular A-76 (or revised Circular) will be given interested party status for the purposes of initiating a GAO protest. We also understand that the person representing a majority of employees of the federal agency who are engaged in the performance of the activity or function of this competition will be accorded intervenor status.

Preliminary Issues

1. Unions acting as 'persons representing a majority of employees'.

As an initial matter, we believe that GAO should be proactive in creating rules as to who is the "person representing a majority of employees" as the intervenor. In the absence of GAO directive, federal agencies will be left to independent determination as



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to who can be an intervenor in a pending GAO protest. This result could lead to the recognition of a union, certified under 5 U.S.C. § 7111, as an intervenor in one action, and another individual in another GAO action, even though the federal agency activity or function has a certified representative. This variation should not be tolerated by the GAO.

The revised Circular defines "Representatives of Directly Affected Employees" as a designate of an incumbent "labor organization accorded exclusive recognition under 5 U.S.C. § 7111." Circular A-76 (May 29, 2003), Attachment D at 9. Significantly, this definition of "Representatives" substantially mirrors the definition of "Directly Interested Parties" by recognizing a single "individual" designated by "directly affected employees." 'Appointment' of a Representative for Directly Affected Employees only comes into play when employees are "not represented by a labor organization under 5 U.S.C. § 7111." *Id.*

Title 5 U.S.C. § 7111 compels a Federal agency to "accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election." 5 U.S.C. § 7111(a). The petition for such certification and any ensuing election is overseen by the FLRA, which is charged with the supervision and conduct of "elections to determine whether a labor organization has been selected as an exclusive representative by a majority of employees in an appropriate unit." 5 U.S.C. § 7105 (2)(B). Under this authority, the FLRA certifies a labor organization as the exclusive representative upon determination that the election conducted under its jurisdiction is full and fair. The FLRA has literally certified hundreds of units since the enactment of the Civil Service Reform Act in 1978.

Once certified by the FLRA, each labor organization is held to the same high standard of representation and tasked with the legal responsibility of "representing *all employees* in the unit without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1) (emphasis added). Deviations from this objective standard are investigated and adjudicated by the FLRA. No other process of determining majority designation by Federal employees within the Federal agencies can be compared in the thoroughness, detailed procedure, and checks and balances developed by the FLRA's over last twenty-seven years.

Where there is a certified representative in a unit or units impacted by an agency decision to outsource, any suggestion that the employee representative can be a person *other than* the certified labor organization's designee inappropriately disregards the statutory selection process already in place. The revised Circular recognizes this role in its definition of "Representatives of Directly Affected Employees" and draws the distinction between the "exclusive recognition" under 5 U.S.C. § 7111 and "a representative appointed by directly affected employees" where employees *are not* represented by a labor organization under 5 U.S.C. § 7111. To accept that the employee

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 February 16, 2005
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representative could be a person *other than a union designee* unnecessarily creates unfettered discretion for each individual agency to determine how such representatives would be chosen, thus resulting in potential conflicting results within the same organizational unit. Nothing would prevent employees impacted by an agency outsourcing decision to change representatives at any moment and unnecessarily delay or disrupt the contest/protest process. Further, nothing legally insures that the employee "elected" will represent the interests of those directly affected employees to the fullest extent under the law. Giving the agency control over who will represent impacted employees under the revised Circular in effect allows the Federal agency, not the impacted employees, to dictate who the employee representative will be.

2. ATO Bias

As a secondary matter, we understand that a decision whether or not to file a protest on behalf of federal employees is not subject to review by the GAO. However, such decision must be accompanied by written notification to Congress whenever the ATO makes a determination that no reasonable basis exists to file a protest. While this issue is part of the Authorization Act, we are compelled to state that this provision in the law unnecessarily politicizes the bid protest process.

We again ask the Comptroller General to take affirmative action and request Congress to amend this provision so that GAO has jurisdiction to review such decisions rendered by the ATO. The ATO is not without bias. While CICA and the revised Circular compel the conclusion that the ATO is an "interested party," the question remains how often the ATO *will* act as an "interested party" for the purposes of protesting an agency decision to outsource in-house functions. The ATO is, after all, an inherently governmental employee, who is, in unfortunate reality, a part and parcel of the managerial and political influences of any agency. As such, the ATO may have relatively limited incentive to protest his/her employers' decision to contract out commercial functions. Unless the ATO can be immunized from political pressures associated with his/her employing agency, few ATO protests will be filed and your Office will be precluded from performing the statutory function and reviewing alleged violations of procurement and regulation.

Issues Raised by the Notice

1. Exhaustion of Administrative Remedies

With regard to the specific issues to which the Notice requests comment, we do not believe that a protestor should be required to exhaust administrative remedies before filing with the GAO. As stated above, the ATO is not without bias. As a federal employee, he or she will have relatively low incentive to overturn an agency decision. Requiring exhaustion of administrative appeals unnecessarily delays impartial third-party review by the GAO.

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 February 16, 2005
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2. Review of Streamlined Competitions

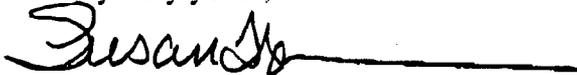
With regard to streamlined competitions authorized by the revised Circular, we are in favor of GAO review. According to the Federal Register notice of May 29, 2003 that accompanied the release of the revised Circular, "the revised Circular is intended to encourage greater trust and more robust participation in public-private competition by both sectors through processes that promote fairness, integrity, and transparency."¹ In other words, the policy is to imbue the Federal government with the positive traits inherent in the private sector. In order to remain consonant with the stated goal of 'leveling the playing field' in the game of A-76, the net result should be to provide equal access to the GAO bid procedures for both standard and streamlined competitions.

Since the single, most essential component of the revised Circular is sector neutral, fair competition, it is not insignificant that the new A-76 designates the "streamlined" agency analysis as a "competition", which in turn implies a contest, an "effort of two or more parties, *acting independently*, to secure the business of a third party by the *offer of the most favorable terms* . . ."² Consistent with this tenet, the revised Circular, contrary to the 'direct conversion' under the old A-76 rules³, compels the agency to conduct a market research prior to seeking a private offer.

In order to insure that any 'competition' conducted pursuant to the A-76 is not fixed, illegal or unfair, an independent party should review agency streamlined determinations to outsource commercial functions. Particularly, where a protestor alleges a knowing and egregious violation of FAR Parts 5.401(a), 5(401) (b)(1), and 5.205(c) and 5.207 prior to the solicitation period, allowing potentially prohibited expenditures of public funds without GAO review disregards its purported mission to remain accountable to the American people when their resources are spent.

We appreciate the opportunity to voice our concerns on this matter. Your attention is greatly appreciated.

Very truly yours,



Susan Tsui Grundmann
 General Counsel

cc: National Executive Council
 Business Representatives

¹ 68 Fed. Reg. 103 (May 29, 2003) at C. l. a. i.

² Black's Law Dictionary, abridged 6th edition, 1991 at 195.

³ GAO has entertained protests regarding direct conversions under the previous revisions of A-76. *See e.g.*, 68 Comp. Gen. 563 (1989); B-283055 (1999).



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(INSTALLATIONS AND ENVIRONMENT)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

February 18, 2005

Michael R. Golden, Esq.
Assistant General Counsel
Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Golden:

On 20 December 2004, the Government Accountability Office (GAO) published in the Federal Register proposed amendments to its Bid Protest Regulations. The proposed amendments will implement the requirements of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, in relation to the bid protest process where a competition under Circular A-76 has been conducted. The proposed regulation specifically applies to the conduct of a public – private competition regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees. GAO requested comments on the proposed amendments, as well as suggestions for changes to other areas of GAO's Bid Protest Regulations or the bid protest process.

The Department of the Navy submits the following comments on the amendments to the bid protest regulations, as well as additional suggestions for changes to the GAO Bid Protest Regulations in response to your Federal Register Notice.

Interested Party – 4 CFR 21 (a)(2):

The Department of the Navy believes the definition and descriptors for when the official submitting the agency tender may be an interested party are appropriate. We offer no changes to proposed section 21(a)(2).

The Department of the Navy suggests, however, that GAO look further at its authority over protests from smaller competitions and modify the regulation with respect to admissions to protective orders (4 CFR 21.4). GAO's comments make clear that it intends to follow *Vallie Bray*, B-293840 and allow protests in streamlined competitions under the revised Circular from interested parties. Such a decision has significant implications and costs. In this context, adopting *Vallie Bray* could result in a result for streamlined competitions at odds with the congressional intent that all parties to the competition have fair access to the protest process. Because the new CICA definition is limited to protests involving over 65 positions, GAO should address steps to put government employee participants in streamlined studies on an equal footing with private parties, including whether Congress should modify GAO's authority under CICA for purposes of A-76 or should further enlarge the definition of "interested party" to cover streamlined competitions.

Allowing protests by ATOs also raises a question respecting protective orders. Normally, counsel to an interested party is admitted under a protective order to facilitate the protest. An

application for admission to the protective order must establish that the applicant is not involved in competitive decision-making. A more definitive expression of what constitutes "competitive decision-making" on the part of an attorney assisting the agency tender official (ATO) in an A-76 competition would assist federal agencies in determining how to provide legal advice and counsel to ATOs. We recommend that agency attorneys advising the ATO be admitted to the protective order so long as the agency implements sufficient procedures to ensure the attorney cannot subsequently take part in advising the ATO during a re-competition of the function under study.

A second question left unresolved is whether the ATO must share study information and data with the majority representative. Assuming there is such a requirement, it is not clear that any information considered proprietary may be withheld from the representative. We recommend that the regulation be clarified to state that the ATO is not required to share information and that proprietary information can be withheld.

Allowable Intervenorors – 4 CFR 21 (b)(2):

The Department of the Navy concurs with the proposed regulation's language determining that, consistent with section 326 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, both the ATO and a person representing a majority of employees engaged in the function under study may act as intervenors. The Navy notes, however, that this language is permissive in contrast to Rule 21.0(b), which defines intervenors based upon their competitive status. Because the proposed language is permissive, the Navy recommends that GAO clarify whether intervenor status is automatic or whether the ATO or representative's status as intervenor is contingent upon the conditions in paragraph (b)(1) (that the intervenor has received award, or before award, that there is a substantial prospect that the intervenor will receive award).

The Navy anticipates various questions and issues will arise surrounding the terms "majority" and "representation," whether an individual may refuse to represent the employees, whether certain individuals may be excluded from representing the employees, whether the representative may be "any" person, and, whether the individual appointed by the majority of employees to represent their interests need have any qualifications to do so. The Navy will address these issues through internal means as appropriate.

Decision to File 4 - CFR 21.5(k):

The Navy finds the statement that GAO will not review an ATO decision to file or not file a protest to be appropriate. It offers no changes to proposed section 21.5(k).


THOMAS N. LEDVINA
Assistant General Counsel
(Installations and Environment)



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
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Michael R. Golden, Esq.
Assistant General Counsel
Government Accountability Office
441 G Street, NW
Washington, DC 20548

18 FEB 2005

2005 FEB 18 PM 2:10

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USGAD

Dear Mr. Golden:

The Department of Defense Office of General Counsel respectfully submits these comments concerning the Government Accountability Office's (GAO's) proposed amendments to its bid protest regulations to address protests filed in connection with public-private competitions under Office of Management and Budget (OMB) Circular No. A-76 (Revised), Performance of Commercial Activities. We have no objection to the amendments, which largely incorporate the text of recent amendments to the Competition in Contracting Act, 31 U.S.C. §§ 3551, et seq. We do, however, offer several observations for further consideration, including one additional amendment to the regulations.

GAO proposes to amend its bid protest regulations to permit "a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition" to intervene in certain protests, but GAO does not set forth criteria by which it will identify that person. To the extent that the agency concerned has established such criteria, or has identified the employees' representative in reviewing a contest under Circular A-76, we believe that GAO should defer to the agency's determination. This will reduce the risk that a person whom the agency has deemed to be the employees' representative, for purposes of filing a contest, will be disqualified by GAO from intervening in a protest.

To implement subsection 326(e) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, we recommend that GAO insert another paragraph in section 21.5 of its bid protest regulations. Subsection 326(e) provides that "the amendments made by this section shall not be construed to authorize the use of a protest under subchapter V of chapter 35 of title 31, United States Code, with regard to a decision made by an agency tender official." Although GAO proposes to amend section 21.5 to foreclose review of an agency tender official's decision to file, or not to file, a protest, subsection 326(e) excludes a broader range of issues from consideration. For example, a representative of a majority of directly affected employees could not, upon intervening in a protest, challenge the agency tender official's preparation of the agency tender or decisions with regard to the competition, or the structure of the government's most-efficient organization. We propose the following, as paragraph (l) in section 21.5: "*Decisions by agency tender official.* GAO will not review a decision by an agency tender official in connection with a public-private competition."



In our view, GAO should require an attorney who represents an agency tender official to apply for admission under a protective order. The revisions to Circular A-76 reflect OMB's adherence to the rules governing competitive procurement in the Federal Acquisition Regulation. Safeguards against the inadvertent disclosure of protected information, by attorneys for all competitors before GAO, will reinforce the integrity of the competitive process. GAO should consider whether a government attorney is involved in competitive decision-making, as it does in reviewing applications from attorneys in the private bar, and should deny admission in those cases because of the risk of inadvertent disclosure of sensitive information. See, e.g., AirTrak Travel, et al., B-292101, June 30, 2003; see also U.S. Steel Corporation, et al. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). In order to enforce protective orders in a manner that will allow an agency to provide legal representation both to the contracting officer and agency tender official, we believe that GAO should tailor protective orders to apply to particular government attorneys, and should not disqualify entire offices of general counsel from further involvement in competitive decision-making on the agency tender official's behalf.

If an agency were to assign an attorney to the representative of a majority of directly affected employees, the ordinary standards for admission under a protective order would not be useful. No attorney so assigned would be involved in competitive decision-making, because directly affected employees are not actual or prospective bidders or offerors. Nonetheless, a directly affected employee could be a member of the team that develops the government's most-efficient organization, or could otherwise be closely associated with that team. GAO should consider such associations in assessing the risk of inadvertent disclosure of sensitive information.

We note that GAO's enforcement of protective orders with respect to attorneys for the government may depend, in part, on the conditions under which an agency provides legal representation to the agency tender official and the employees' representative. GAO has not asked for comments on that question, and we do not address it here. We believe that federal agencies should settle the matter of legal representation, and that GAO should proceed in light of the fact that the issue remains largely unresolved.

We appreciate the opportunity to comment. Please contact Charles Bidwell, at (703) 697-9136, if you have questions or wish to discuss these matters.

Sincerely,



Douglas P. Larsen
Deputy General Counsel
(Acquisition & Logistics)



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MARIA CASANOVA, CONFIDENTIAL SECRETARY TO NVF

February 18, 2005.

To: Government Accountability Office
From: Martin R. Cohen, Assistant General Counsel for Litigation, AFGE
Subject: Comments Regarding Proposed Bid Protest Regulations With
Regard to Amendments to the CICA contained in Section 326 of FY05
DoD Authorization Act.

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Introduction

The below stated comments represent the position of the American Federation of Government Employees, AFL-CIO, "AFGE", on the proposed bid protest regulations. AFGE strongly believes that the statutory language adopted by Congress did not create anything close to an even playing field for the in house employees to appeal contracting out decisions made in violation of OMB Circular A-76 and/or other federal law to the GAO or to the Court of Federal Claims. However the instant comments will pertain only to the proposed GAO regulations as regards proceedings before the GAO, and will be made with the recognition that the GAO must issue regulations in conformity with the statutory language.

Comments

At least twice in the statutory amendments Congress refers to the position of the affected employees regarding an A-76 competition. Thus the statutory amendments clearly contemplate that the ATO's decision whether or not to file a bid protest with regard to a public private-competition might differ from the position on that issue of the "majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to such public-private competition". See amended Section 3552(b)(1). [The statutory language in addition indicates that the word



“majority” is not used with reference to the number of employee positions in the MEO but to the number of employees holding positions in the pre-existing organization(s) that will be affected or impacted in some way by the implementation of the MEO.]

Congress also expressed a similar thought, i.e. that a majority of affected employees and the ATO might differ, when in amended Section 3553(g) it indicated that if an “interested party” [which obviously includes the ATO] filed a protest, “a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function [understood to be employees of the pre MEO organization(s) who will be affected or impacted in some way by the implementation of the MEO] subject to the public-private competition may intervene in protest”. [This means that this person, who is not the ATO, has a statutory right to intervene in a bid protest before the GAO.]

In both instances it is reasonable to assume that Congress intended/presumed that if a certified labor organization or organizations represent any of the impacted employees they individually or jointly should be the vehicle by which the majority of employees express their position either to the ATO or to the GAO. Federal Sector labor organizations, pursuant to their statutory basis, are pre-existing entities that are charged with representing the interests of all the employees in their bargaining units. Their officers are elected by carefully scrutinized democratic elections. See 5 U.S.C. Sections 7101 et seq. They are the only mechanism that probably could, within meaningful timeframes, lead to the identification of a spokesperson/attorney for the majority of affected employees in these situations. Given the labor statute, the GAO is legally empowered to and should adopt regulations that presume that a spokesperson for the majority of employees would be identified by way of these certified labor organizations.

Hence a new section 4 CFR 21(b)(3) should be added that mandates as follows:

(b)(3)As soon as an interested party files a bid protest regarding an A-76 matter the GAO shall promptly, i.e. within twenty four hours, notify all certified labor organizations that represent any of the impacted employees of this fact. Furthermore any and all materials and information made available to the other parties at the debriefing or elsewhere in any way or at any time

shall be made promptly, i.e. within twenty-four hours, available to those labor organizations.

[It is only with such notification and information that the statutory language regarding the intervener status of the majority of employees can be given meaning.]

Thus in order to be a meaningful intervener, the labor organization(s), or its/their representative(s), must be privy to all of the information conveyed to any other party in the debriefing and/or any other similar communication to other parties.

In a similar manner, for the involved labor organizations to make a meaningful request to the ATO to file a protest, these labor organizations must be given full access to the debriefing, i.e. be present at the debriefing, and be given any other information available to the other parties immediately after a contract award. [All of the types of rights and privileges offered for example under Standing Order No. 38 at the Court of Federal Claims in Bid Protests to parties or their attorneys, should be offered to the labor organizations in these public-private situations at the GAO.] In light of this, the following is suggested as an additional provision for the GAO regulations:

Section 21.0 (b)(4) At the time of any such award, any labor organization which represents any affected and/or impacted employee(s) shall have the right to attend any and all debriefings and to timely receive any and all information that an interested party would receive, in order to permit said organizations to make a meaningful decision whether to request the ATO to file a bid protest on their behalf and to also enable them to be a meaningful intervener in the event that a bid protest is filed by any interested party.

Conclusion

The suggested provisions implement the language passed by Congress.¹

¹ The amendments adopted by Congress appear to bar both the ATO as an interested party and the person representing the majority of affected employees as interveners, from participating in a GAO bid protest proceeding with regard to a competition involving 65 or fewer employees, i.e. a streamlined competition, even where an agency has issued a solicitation. Given that a private contractor, according to the GAO, could file a bid protest regarding such a competition, it appears inequitable that neither the ATO as an interested party nor the person representing a majority of affected employees as interveners could initiate, or participate, in such a proceeding.

From: Lisa May <LDMay@jacksonmay.com>
To: <RegComments@gao.gov>
Date: 1/2/2005 9:20:59 PM
Subject: Proposed A-76 Rule

I believe the proposed rule is an excellent step towards giving federal agency teams the same rights and protections as the industry offerors. If we are required to compete by the same rules, we should have the right to protest their application and other aspects of the procurement just like any other offeror.

The rule, however, should extend to any A-76 announced under the new rules (May 2003) and not be restricted to those announced after January 1, 2004. There is no compelling reason to exclude the studies announced between May and January, and the MEOs currently completing studies should have the same protections as those just beginning them.

Thank you.

-Lisa May
Agency Tender Official, NASA NSSC Study

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