



## Decision

**Matter of:** Aleut Facilities Support Services, LLC

**File:** B-401925

**Date:** October 13, 2009

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Robert S. Gardner, Esq., for the protester.

Gary R. Allen, Esq., Department of the Air Force, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

GAO will generally not review agency's decision to cancel a solicitation to perform the work in-house because decision whether to perform work in-house is generally a matter of executive branch policy.

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### DECISION

Aleut Facilities Support Services, LLC of Aurora, Colorado protests the Department of the Air Force's decision to cancel solicitation No. FA3002-09-R-0010 for supply, fuels, and transportation services for Tyndall Air Force Base.

We dismiss the protest.

The Air Force canceled the solicitation after receiving proposals, but before opening and evaluating them, to perform the work in-house. The agency made this decision after comparing the expected total cost of contract performance by a contractor (without evaluating the proposals under the RFP) with the total cost of performance in-house using the COMPARE software program, and determining that a cost savings could be realized by in-sourcing the work. Agency Dismissal Request, Declaration of Chief, Strategic Sourcing Branch, Manpower and Organization Division, Headquarters Air Education and Training, Department of Air Force (Sept. 17, 2009), at 1. The protester asserts that the cancellation was not reasonable because the procurement is not one that should be granted priority consideration for in-sourcing under Pub. L. No. 110-181, Div. A, Title III, § 324(a)(1), 122 Stat. 60 (2008) (appearing at 10 U.S.C.A. § 2463 (2009 Supp.)), and because the agency did not conduct a proper economic analysis. Protest at 3-4.

The statute at issue here--10 U.S.C.A. § 2463--provides as follows:

(a) Guidelines required.--(1) The Under Secretary of Defense for Personnel and Readiness shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Department of Defense [DoD] civilian employees to perform new functions and functions that are performed by contractors and could be performed by [DoD] civilian employees. . . .

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(b) Special consideration for certain functions.--The guidelines and procedures required under subsection (a) shall provide for special consideration to be given to using [DoD] civilian employees to perform any function that--

(1) is performed by a contractor and--

(A) has been performed by [DoD] civilian employees at any time during the previous 10 years;

(B) is a function closely associated with the performance of an inherently governmental function;

(C) has been performed pursuant to a contract awarded on a non-competitive basis; or

(D) has been performed poorly, as determined by a contracting office during the 5-year period preceding the date of such determination, because of excessive costs or inferior quality; or

(2) is a new requirement, with a particular emphasis given to a new requirement that is similar to a function previously performed by [DoD] civilian employees or is a function closely associated with the performance of an inherently governmental function.

10 U.S.C.A. § 2463.

Subsequent to the enactment of this statute, the DOD has issued several policy memoranda that set forth guidance for considering whether to perform work in-house. Three such memoranda, issued on July 27, 2007, April 4, 2008, and May 28, 2009, have been provided to our Office, as well as an Air Force memorandum dated July 13, 2009, and current DOD and Air Force policy guides that provide general procedures for in-sourcing. These memoranda and policy guides reflect the evolution of DOD's policy guidance since the enactment of the statute and indicate that the policy guidance is not yet completed. See Air Force Response to GAO Questions, attach. 4, DOD In-Sourcing Implementation Guidance § 5.2.2 (referring to directives that have not yet been issued).

Aleut contends that the Air Force's decision to cancel the solicitation is not reasonable because the work at issue here--transportation services--does not warrant priority consideration for in-sourcing under 10 U.S.C.A. § 2463. Specifically, Aleut

contends that the work should not be retained in-house because the transportation services do not fall within the enumerated functions identified for special consideration in paragraph (b) (quoted above). Aleut also contends that the agency's cost comparison violates the DOD's in-sourcing guidance, which was implemented pursuant to 10 U.S.C.A. § 2463, and is otherwise inaccurate.

Our Office will not review the Air Force's actions. Although we review agency decisions to cancel solicitations to determine whether those decisions are reasonably based, we generally do not review them when the work in question is to be performed in-house because such decisions are generally a matter of executive branch policy. General Servs. Admin.–Recon., B-237268.3 et al., Nov. 7, 1990, 90-2 CPD ¶ 369 at 2. However, we have recognized limited exceptions where a solicitation requires a cost comparison in accordance with Office of Management and Budget Circular No. A-76, Digicon Corp., B-256620, July 7, 1994, 94-2 CPD ¶ 12 at 2, where a statute or regulation requires a cost comparison before retaining the work in-house, Imaging Sys. Tech., B-283817.3, Dec. 19, 2000, 2001 CPD ¶ 2 at 4,<sup>1</sup> or where the protester argues that the agency's rationale for canceling the solicitation is a pretext, Griffin Servs., Inc., B-237268.2 et al., June 14, 1990, 90-1 CPD ¶ 558 at 3. None of these exceptions apply here.

Here, the statute in question--10 U.S.C.A. § 2463--does not require, nor does Aleut allege it requires, a cost comparison between the agency and outside contractors. Aleut's allegation that the work required by the solicitation should not be given priority consideration under 10 U.S.C.A § 2463 fails to state a valid basis of protest. As quoted above, paragraph (b) of the statute establishes categories of functions to be given "special" consideration for in-sourcing, but it does not state that only those categories of functions may be in-sourced. Thus, the Air Force is not precluded by 10 U.S.C.A. § 2463(b) from performing the work in-house.

Aleut also alleges that the agency failed to follow the guidance implemented pursuant to statute. Because this guidance is only internal department policy, a protest asserting that the agency did not adhere to the policy guidance is not subject

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<sup>1</sup> The Imaging Sys. Tech. decision involved 10 U.S.C. § 2462, which we regarded as a procurement statute that then required a cost comparison before retaining work in-house. That section has since been superseded by a section requiring reports on public-private competition. Pub. L. No. 109-163, Div. A. Title III, § 341(c)(1) (Jan. 6, 2006), 199 Stat. 3197 (2006), 10 U.S.C.A. § 2462 (2009 Supp.)

to our review. Hughes Space and Commc'n Co.; Lockheed Missiles & Space Co., Inc., B-266225.6 et al., Apr. 15, 1996, 96-1 CPD ¶ 199 at 17; Indian Res. Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29 at 3.<sup>2</sup>

The protest is dismissed.

Lynn H. Gibson  
Acting General Counsel

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<sup>2</sup> Aleut also alleges that the agency violated its duty to “honestly and fairly consider” Aleut’s proposal when it canceled the solicitation. However, Aleut has not provided sufficient facts to support its claim.