

DECISION



12717 J. Carter
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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195733
B-196117

DATE: February 4, 1980

MATTER OF: Locals 1857 and 987, American Federation
of Government Employees

DIGEST:

Determination under Office of Management and Budget Circular A-76 to contract out for services is matter of executive policy not reviewable as bid protest except in limited circumstance of protest by bidder against cost evaluation not conforming to solicitation. Protest by union representing Federal employees is dismissed because union was not a bidder and does not fall within exception.

Locals 1857 and 987 of the American Federation of Government Employees (AFGE) have protested the decision of the Air Force to contract out certain functions of the Precision Measurement Equipment Laboratories (PMEL) at McClellan and Robins Air Force Bases (AFB), respectively. Both actions were accomplished under the same solicitation. For the reasons stated below, we dismiss these protests.

The Air Force made the decision to contract out for the services in question under the guidance of Office of Management and Budget (OMB) Circular No. A-76 (A-76), which reflects the policy of the Federal Government to rely on private enterprise for its needs unless the national interest requires otherwise. As implemented by A-76, the decision whether to contract with the private sector for services or products, in lieu of performance by Government employees, depends largely on a comparison of the costs of these two options. The cost of contracting out is determined by the responses of potential contractors to a solicitation for the services in question; the cost of Government performance is estimated based on criteria set by the department concerned. Essentially, if the evaluation shows the cost of contractor performance to be lower than the cost of continued in-house

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[Protest ~~Invoking~~ ^{Against} Decision To Contract ~~Out~~ ^{208541 Out}]
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performance, the Government employees concerned are subject to reassignment or reduction-in-force actions and a contract for the services is awarded to the lowest cost offeror.

It was decided to contract out in these two cases. The two locals represent the affected Government employees.

Local 1857 challenges the accuracy of the Air Force's cost evaluation and contends that the award of this contract violates both the provisions of 5 U.S.C § 3109 which "authorizes 'only' the procurement of expert and consultant services" and the vested employment rights of the affected employees under several different acts. Local 987 adds to these allegations that it was not provided sufficient information to fulfill its representational obligation and that the 10 days it had to initiate an appeal was not sufficient. Local 1857 also suggests that the solicitation contained faulty and misleading cost data, a paraphrase of language in our decision in Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38, (Crown) in an apparent effort to characterize its protest as a challenge to the propriety of the solicitation and bring it within the exception recognized in Crown to our policy of not considering protests against determinations to contract out under A-76.

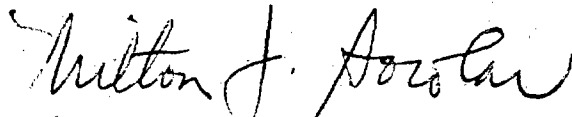
The threshold question is whether we should consider these protests. For the following reasons, we decline to do so.

We have consistently declined to consider protests concerning the propriety of an agency's decision under A-76 to contract out in lieu of performing work in-house on the basis that these actions involved matters of executive policy not within the protest decision function of our Office. See, e.g., Local F76, International Association of Firefighters, B-194084, March 28, 1979, 79-1 CPD 209; Rand Information Systems, B-192608, September 11, 1978, 78-2 CPD 189. In Crown, however, although finding the protest to be untimely, we recognized an exception to this policy by indicating

that we would consider detrimental to the competitive system the conduct of a cost comparison which did not conform to the terms of the solicitation where the Government has stated the circumstances under which it will (or will not) award a contract and induced the submission of bids. This exception is narrowly drawn, intended to protect parties that have submitted bids from the arbitrary rejection of their bids, and does not extend to nonbidders. These locals were not bidders and, as a result, their protests do not fall within the exception recognized in Crown to our policy of not considering protests against agency contracting-out decisions under A-76.

The protests are dismissed.

The contention that these contracts violate the provisions of 5 U.S.C. § 3109 does, however, warrant some additional comment since it seems to be based on the mistaken premise that the Government only has the authority to contract for expert and consultant services. Both this Office and the Civil Service Commission, predecessor to the Office of Personnel Management, have recognized that services normally performed by Government employees may be procured by proper contract if that method of obtaining the services is found to be more feasible, more economical, or necessary to the accomplishment of the agency's task, 51 Comp. Gen. 561 (1972), and as long as the relationship between the Government and the contract personnel is not that of employer-employee. 45 Comp. Gen. 649 (1966); Consultant Services - T.C. Associates, B-193035, April 12, 1979.



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