



Comptroller General
of the United States

1130127

Washington, D.C. 20548

Decision

Matter of: Premiere Vending

File: B-256560

Date: July 5, 1994

Pamela J. Mazza, Esq., and Antonio R. Franco, Esq., Pillero, Mazza & Pargament, for the protester.
C. Joseph Carroll, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will consider a protest concerning procurement conducted by an agency's employees' association, a non-appropriated fund instrumentality, where protester alleges that agency is diverting vending machine requirements to employees' association in order to avoid applicable procurement statutes and regulations.
2. Protest contending that agency is improperly channeling vending machine requirement through employees' association in order to avoid applicable procurement statutes and regulations is denied where the employees' association is a distinct and separate entity from the agency; the vending machine requirement is not part of the agency's requirement but instead constitutes a benefit for agency employees and visitors which has been historically provided by the employees club; and any benefit to the agency is incidental and minor in nature.

DECISION

Premiere Vending protests any award by the Boron Federal Prison Camp Employees Club--a non-appropriated fund instrumentality (NAFI) of the Federal Bureau of Prisons (BOP), Department of Justice--under a solicitation issued by the Employees Club for servicing 11 vending machines located in the Boron, California, prison facility's employee and visitor lounges. Premiere contends that, by allowing the Employees Club to conduct these procurements, the BOP is circumventing the Competition in Contracting Act's (CICA) requirements for full and open competition.

We deny the protest.

Background

The Boron Federal Prison Camp has 17 vending machines located at its facility. Six of these machines are located inside the inmate area of the prison; the remaining 11 machines are located in the employee and visitor lounge areas and are the subject of this protest.

The six machines located inside the inmate area of the prison are for the primary use of the inmates; the BOP maintains and procures services for these machines as part of its agency mission and objective--to provide housing and rehabilitation for prison inmates. On September 20, 1993, the BOP issued request for proposals (RFP) No. 150-0076 to procure vending machine services for these six machines.

On October 26, the agency held a preproposal conference for all prospective offerors under RFP No. 150-0076, which Premiere attended. The purpose of this conference was to provide contractors with an opportunity to view the inmate areas and learn the complex security procedures associated with providing inmate vending machine services. That same day--as contractors were leaving the preproposal conference--members of the Boron Employees Club distributed copies of the solicitation being challenged here.

On December 30, Premiere filed a protest with BOP agency procurement officials challenging the authority of the Boron Employees Club to conduct the employee and visitor lounge vending machine procurement. On February 21, 1994, the Boron Employees Club awarded a contract for the challenged vending machine services to R&M Vending; on March 2, Premiere filed this protest with our Office.

¹Initially, Premiere also protested the award made under this RFP; however, after reviewing the agency report, Premiere withdrew this protest ground.

²Since Premiere failed to protest the Employees Club solicitation until after the solicitation's December 3 closing date, the protest is untimely. See 4 C.F.R. § 21.2(a)(1) (1994). Nevertheless, we are considering Premiere's protest under the significant issue exception to our timeliness rules, 4 C.F.R. § 21.2(c). In our view, the issue raised here--whether an agency is improperly diverting its requirements to a NAFFI for noncompetitive acquisition--is one of widespread interest to the procurement community and one that has not been previously decided by this Office. Additionally, because the record shows that several BOP

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Jurisdiction

The statutory authority of this Office to decide bid protests of procurement actions is set forth in CICA, 31 U.S.C. §§ 3551 et seq. (1988). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for the procurement of property or services, or a written objection by an interested party to the award or proposed award of a contract. 31 U.S.C. § 3551(1).

Since the passage of CICA, this Office's bid protest jurisdiction has not been based on the expenditure of appropriated funds or on the existence of some direct benefit to the government. Americable Int'l. Inc., B-251614; B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336. Instead, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Id.

In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 472 (1988). 31 U.S.C. § 3551(3). As defined therein, an executive branch federal agency includes any executive department or independent establishment, including wholly-owned government corporations. NAFIs, such as the Boron Employees Club, do not meet the statutory definition of federal agencies; although NAFIs are generally recognized as being associated and generally supervised by their respective government entities--in this case, the BOP--NAFIs operate without appropriated funds and are not part of a government agency. University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. As such, NAFIs are therefore beyond the jurisdiction of our bid protest forum and, consequently, we generally will not review procurements conducted by these entities. However, where the protester asserts that a NAIFI is acting as a mere conduit for the agency in order to circumvent the CICA mandate for full and open competition, we will review the protest. Compare Americable Int'l. Inc., supra (we declined jurisdiction absent suggestion that procuring agency was somehow acting in concert with a NAIFI to

² (...continued)

installations have simultaneous agency and employee club vending machine procurements pending, we believe this issue is one that can be expected to arise in future procurements. Consequently, we consider the issue raised here to be a significant one that should be treated on the merits. See Satilla Rural Elec. Membership Corp., B-238187, May 7, 1990, 90-1 CPD ¶ 456.

circumvent applicable procurement statutes) with Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 (we will review a protest that an agency is improperly using a cooperative agreement to avoid the requirements of procurement statutes and regulations).

Here, in light of Premiere's allegation that the BOP is channeling this requirement through the Boron Employees Club in order to avoid competitively procuring its vending machine requirements, we will invoke our bid protest jurisdiction to decide the merits of this protest. As discussed below, we deny the protest based on our conclusion that the BOP is not diverting its requirements for vending machine services to the Boron Employees Club.

Analysis

The protester asserts that the BOP is channeling this vending machine services requirement through the Boron Employees Club for procurement by that entity so that the agency may circumvent CICA and the implementing regulations. The crux of the protester's argument is that the agency has taken a larger 17-vending-machine requirement and improperly set aside 11 of the machines for procurement by the Boron Employees Club.

Contrary to the protester's assertion, the record here shows that the 11 vending machines which are the subject of this procurement are not part of the BOP's requirements. Rather, the only vending machines which the BOP requires for the inmate population at Boron are the six machines which were the subject of RFP No. 150-0076. The additional 11 machines are not to be used by the inmate population; these machines are located in the employee and visitor lounges rather than in the inmate area and have always been maintained and serviced by the Boron Employees Club. The BOP has permitted the Boron Employees Club to install these machines as a means to raise revenues for the club and simultaneously, provide refreshments for prison employees; the BOP reports that this gesture is also intended to foster the morale of the Boron prison employees.

Since the record shows that these 11 machines do not represent or serve the agency's needs or objectives, we fail to see how the BOP can be said to be diverting a requirement to the Boron Employees Club. We therefore conclude that this procurement is a bona fide NAFL procurement, properly intended to serve the Boron Employees Club and its membership needs.

All profits generated by the six vending machines located in the inmate areas (RFP No. 150-0076) are collected by the BOP and transferred to an inmate trust fund; the trust fund

money is used by the BOP to purchase recreational items for the inmates--such as games or televisions. With respect to the profits generated by the vending machines located in the employee lounges, the agency reports that the Boron Employees Club keeps all of these profits, as well as 85 percent of the profits generated by the vending machines located in the visitor lounges. However, because inmates occasionally have access to the machines located in the visitor lounges, the BOP has arranged to have the Boron Employees Club donate 15 percent of the profits collected from the visitor area machines to the inmate recreational trust fund.

As a result of this financial arrangement--as well as the fact that inmates occasionally purchase goods from these machines--the protester argues that this portion of the visitor lounge vending machine services must be competitively procured by the agency instead of the Employees Club. We disagree.

Notwithstanding the fact that inmates may have limited access to buy items from the visitor lounge vending machines, as noted above, the record shows that these machines are not necessary to serve the BOP's mission of inmate care. The machines located in the visitor lounges exist for the benefit of the Boron Employees Club, and while these machines may provide incidental benefits to the inmates during prison visiting hours, this access by the inmates does not convert the machines into an agency requirement. Further, we think the involvement of another contractor--to provide the inmate portion of the visitors lounge vending machine requirement--would unnecessarily complicate the Boron Employees Club supervision of these machines and unnecessarily require the BOP to duplicate its administrative responsibilities and expenses, given the minor and incidental nature of the benefits to the inmates. See Departments of the Army and Air Force, Army and Air Force Exchange Serv., B-235742, Apr. 24, 1990, 90-1 CPD, ¶ 410.

The protest is denied.

/s/ Robert H. Hunter
Robert P. Murphy
Acting General Counsel