

DECISION



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

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FILE: B-183487

DATE: July 3, 1975

MATTER OF: American Federation of Government Employees
Local No. 3347, AFL-CIO

DIGEST:

1. Whether EPA service contract for warehouse receiving function is improper will depend upon whether contractor or employees are functioning in contracting agency administration of contract essentially as Government employees as tested by factors delineated in Civil Service Commission 1967 opinion, as supplemented.
2. OMB Circular A-76 expresses policy guidance with respect to whether certain services should be provided in-house or purchased from commercial sources, but alleged failure of agency to comply with Circular is not for consideration under GAO bid protest procedures.

The American Federation of Government Employees (AFGE), Local No. 3347, AFL-CIO, has protested the proposed award of a contract by the Environmental Protection Agency (EPA), Contracts Management Division, NCCM-7, Research Triangle Park, North Carolina, on the grounds that the proposed award is for personal services and would create what is tantamount to an employer-employee relationship between the Government and contractor personnel in violation of Federal personnel laws.

More specifically, the proposed procurement is for the receiving function at the EPA warehouse at Research Triangle Park. The procurement contemplates that a contractor will be selected who will accept the responsibility for receiving all shipments delivered to the EPA warehouse and performing associated paperwork to facilitate timely delivery of the materials to the requestor and acceptance of the materials by the Government.

Presently, all functions relating to receipt, delivery and warehousing of materials are being accomplished by a small group of Civil Service employees who virtually perform all aspects of the warehousing function. However, to provide an allegedly more efficient operation, it was determined by the Director of the General Services Division of the local EPA Office of Administration that the receiving function could best be performed by an independent contractor.

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As a result, discussions were held with Small Business Administration (SBA) representatives for the Atlanta Region prior to announcement of any proposed procurement to the general public. SBA requested that the procurement be set aside for SBA for award to an eligible concern under the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. § 637(a)). Accordingly, request for proposals (RFP) DU-75-C196 was issued to the SBA on March 14, 1975. Subsequently, the RFP was modified to "* * * reflect the planned manner of operation of the contract."

The fact that a contract is for services of a particular nature, e.g. a receiving function, does not in itself indicate that the contract is improper. In general, a contract of this nature may be improper if the contractor or its employees are functioning in the agency's administration of the contract essentially as Government employees as evidenced by the existence to a substantial degree of the factors listed in the October 1967 Civil Service Commission opinion as supplemented in 1968. B-181436, November 1, 1974. In this case, the work will be performed in an area dedicated to such receiving function and "there will be no mingling of Government and Contractor personnel in that area." Also, it is our understanding that there will be no supervision of contractor personnel by Government personnel. Therefore, we are aware of nothing in the contract which would violate the principles enunciated in the Civil Service Commission opinions. Administration of the contract in violation of the doctrine in such opinions would be inconsistent with the expressed contract purpose and intent.


In protesting the proposed award, the AFGE has contended that any ensuing contract would be in contravention of OMB Circular A-76 and therefore would be illegal. This conclusion is reached by AFGE by comparing the allegations it has presented with the standards for appropriate service contracting as set forth in the Civil Service Commission General Counsel opinion issued in 1967 regarding the legality of selected contracts at the NASA Goddard Space Flight Center. See B-133394, November 1, 1967.

OMB Circular A-76, while expressing policy guidance with respect to whether certain services should be provided in-house or purchased from commercial sources, is not a regulation in the sense that failure of an agency to comply may affect the validity of the procurement and, therefore, the issue presented is not properly for consideration under our bid protest procedures. See 53 Comp. Gen. 86 (1973); B-179943, December 26, 1973; and General

DataComm Industries, Inc., B-182556, April 9, 1975. In that connection, in 53 Comp. Gen., supra, it was stated:

"* * * we have always regarded the provisions of Circular A-76 as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office. * * *"

Nevertheless, although it is not for consideration under our bid protest procedures, we do have a continuing interest in the matter from a management-audit standpoint. In that regard, we sent an auditor-attorney team to the EPA facilities at Research Triangle to examine the operation as it exists and to discuss the situation with EPA officials and employee union representatives. Further, compliance with the Circular is of deep concern to us and we plan to utilize the information contained in the record in connection with our responsibilities. Also, in a separate letter of today, we have suggested to the EPA Administrator that he may wish to review the circumstances to consider whether the proposed procurement should proceed under the provisions of EPA's implementation of Circular A-76.


Deputy Comptroller General
of the United States