

## GAO Revises Bid Protest Regulations to Include Government Agency Protests of OMB Cir. A-76 Competitions

**Summary:** On April 14, 2005, the Government Accountability Office (GAO) published a final rule amending its bid protest regulations regarding standing for protests in certain public-private competitions under the Office of Management and Budget's Circular (OMB Cir.) A-76. The new regulations: (1) allow an Agency Tender Official (ATO) to file a protest where the affected government function is performed by more than 65 full-time equivalent (FTE) employees; (2) allow an ATO or an employee representative to intervene in a protest where the affected government function is performed by more than 65 FTE employees; and, (3) state that the GAO will not review the determination of the ATO on whether or not to file a protest.

**Background:** In *Dan Duefrene, et al.*, B-293,883 *et al.*, April 19, 2004, 2004 CPD ¶ 82, the GAO held that notwithstanding May 2003 revisions to OMB Cir. A-76, under the plain language of the Competition in Contracting Act (CICA), a representative of a public in-house competitor in a public-private competition was not an interested party eligible to maintain a protest before the GAO. The same day as the *Duefrene* decision, however, the Comptroller General issued a letter to Congressional committees stating that Congress might want to consider amending CICA to allow GAO to hear similar protests in the future. Congress subsequently enacted such an amendment to CICA under The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108-375). The April 14, 2005 GAO final rule implements these statutory provisions.

**Summary of New Regulations:** Key provisions of the GAO regulations include:

- In a public-private competition under Circular A-76 regarding an activity performed by more than 65 FTE employees, the ATO is an interested party and thus is able to file a protest.
- In a public-private competition under Circular A-76 regarding an activity performed by more than 65 FTE employees, if a protest is filed by any interested party, the ATO and a person representing a majority of the employees of the federal agency who are engaged in the performance of the activity may act as intervenors in the protest.
- The GAO will not review the decision of an ATO regarding whether or not to file such a protest.

**Analysis and Conclusion:** Protests of contract awards in non-streamlined public-private competitions now have the potential to become quite crowded affairs. Participants could include the contracting officer, any disappointed private bidders, the ATO, and a representative of the federal employees – all of whom may take adverse positions to one another. In addition, because the representative of the employees can only act as an intervenor and because the GAO will not review a decision by the ATO on whether to file a protest, the federal employees directly affected by the competition and award may not be able to adequately defend their interests should they disagree with an ATO's decision not to file a protest.

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