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GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Final rule.

SUMMARY: This document amends Government Accountability Office (GAO) Bid Protest Regulations by revising the definition of an interested party to permit a protest to be filed by an agency tender official (ATO) in certain public-private competitions under Office of Management and Budget (OMB) Circular A–76. This document also revises the definition of an intervenor to permit an ATO and an employee representative to intervene in certain protests involving public-private competitions under OMB Circular A–76. This action implements the provisions of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 related to the bid protest process, where a public-private competition has been conducted under OMB Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent (FTE) employees of the Federal agency.

DATES: Effective April 14, 2005.

FOR FURTHER INFORMATION CONTACT: Daniel I. Gordon (Managing Associate General Counsel), Michael R. Golden (Assistant General Counsel), Linda S. Lebowitz (Senior Attorney), or Paul N. Wengert (Senior Attorney), 202–512–9732.

SUPPLEMENTARY INFORMATION:

Effective Dates

Section 326(d) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108–375, 118 Stat. 1811, 1848, states that the provisions apply to protests "that relate to studies initiated under Office of Management and Budget Circular A–76 on or after the end of the 90-day period beginning on the date of the enactment of this Act." The date of enactment was October 28, 2004 and, therefore, the end of the 90-day period was January 26, 2005.

Protests filed after the effective date of this final rule that relate to studies initiated under OMB Circular A–76 on or after January 26, 2005, will be considered under this final rule. Protests filed at GAO after the effective date of this final rule that relate to studies initiated under OMB Circular A–76 before January 26, 2005, will be considered under GAO's regulations as they were prior to the issuance of this final rule. The same is true for (1) protests filed on or after the effective date of this rule that supplement or amend a protest filed at GAO before the effective date of this rule and (2) claims and requests for reconsideration filed on or after the effective date of this rule that concern a protest that was not subject to this rule.

Background

On December 20, 2004, GAO published a proposed rule (69 FR 75878) and a correction on December 23, 2004 (69 FR 76979) in which it proposed to amend its Bid Protest Regulations. The supplementary information included with the proposed rule explained that the proposed revisions to GAO's regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551–3556, were to implement the requirements in the National Defense Authorization Act for Fiscal Year 2005 regarding standing to protest to GAO by an in-house competitor in a public-private competition.

GAO addressed the in-house competitor standing issue in *Dan Duefrene; Kelley Dull; Brenda Neuerburg; Gabrielle Martin*, B–293590.2 *et al.*, Apr. 19, 2004, 2004 CPD ¶ 82. In that decision, GAO concluded that, notwithstanding the May 29, 2003 revisions to OMB Circular A–76, the in-house competitor in a public-private competition conducted under the Circular was not an offeror and, therefore, under the then-current language of CICA, a representative of an in-house competitor was not an interested party eligible to maintain a protest before GAO.

On the same day that the *Dan Duefrene* decision was issued, the Comptroller General sent a letter to the cognizant congressional committees, explaining that, because an in-house competitor did not meet the then-current CICA definition of an interested party, GAO was required to dismiss any protest that an in-house competitor filed. In the letter, the Comptroller General recognized that policy considerations, including the principles unanimously agreed to by the congressionally-chartered Commercial Activities Panel, weighed in favor of allowing certain protests by in-house competitors with respect to A–76 competitions and, as a result, Congress might want to consider amending CICA to allow GAO to decide such protests. Consistent with that letter, the National Defense Authorization Act for Fiscal Year 2005 amended CICA to permit certain protests by in-house competitors. The revisions to GAO's Bid Protest Regulations in this final rule implement the statutory provisions.

Summary of Comments

Interested persons were invited to submit comments on GAO's proposed rule by February 18, 2005. GAO received written comments from two federal agencies, five organizations representing contractors, seven unions, and three individuals. In adopting this final rule, GAO has carefully considered all comments received.

A summary of the more significant specific comments concerning GAO's proposed rule, and GAO's responses to these comments, are set forth below. As a general matter, and perhaps reflecting the fact that the proposed rule closely followed the statute, the agencies, one individual commenter, and five of the organizations representing contractors agreed that the proposed regulations correctly implemented the statutory language. On the other hand, while not directly addressing whether the proposed regulations correctly implemented the statute, the seven unions and one individual commenter

questioned whether the law, as well as the proposed regulations, provided effective protest rights for the employees whose jobs were placed at risk by these A–76 competitions.

Section 21.0—Definitions

Interested Party

A number of commenters were concerned that the proposed revision to the definition of an "interested party" would preclude an ATO from protesting a competition involving a function with 65 or fewer FTEs. That is, because it is defined as an interested party only for competitions related to functions performed by more than 65 FTEs, the ATO cannot file a protest at GAO where an agency conducts a competition (whether standard or streamlined) involving a function performed by 65 or fewer FTEs. While two commenters agreed with this aspect of the proposed rule, five commenters urged GAO to extend the revised definitions of an interested party in sec. 21.0(a)(2) and of an intervenor in sec. 21.0(b)(2) to include all public-private competitions conducted under OMB Circular A–76, regardless of the number of FTEs involved, where the federal agency uses the procurement system to conduct the competition. Two additional commenters recognized that such an extension would be inconsistent with the language of the National Defense Authorization Act for Fiscal Year 2005, but expressed disagreement with the statute. One commenter urged GAO to impose parity by refusing to consider a protest from a private-sector entity in such cases if the public-sector competitor could not file a protest.

GAO recognizes a lack of parity may arise in certain situations: unlike an ATO, a private-sector competitor could have standing to file a protest of a standard A–76 competition involving fewer than 65 FTEs, and of a streamlined A–76 competition, if the agency had issued a solicitation and thereby used the procurement system to determine whether to contract out or to perform work in-house. GAO concludes, however, that the rule appropriately follows the statutory language, which grants interested party and intervenor status to designated parties only in the case of an A–76 competition regarding an activity or function of a Federal agency performed by more than 65 FTEs. In GAO's view, it is for Congress to determine the circumstances under which an in-house entity has standing to protest the conduct of an A–76 competition, and the 2004 statutory changes limited public-sector standing to competitions involving an activity or function of a Federal agency performed by more than 65 FTEs of the Federal agency. Moreover, GAO believes that it would not be consistent with CICA for GAO, in an attempt to achieve parity in a competition related to functions with fewer than 65 FTEs, to refuse to consider a private-sector offeror's protest that is otherwise within GAO's bid protest jurisdiction.

Finally, one commenter objected on the basis that an ATO who files a protest is acting unconstitutionally. Determining the constitutionality of the statutory provisions authorizing ATO protests is beyond the scope of this rulemaking and, indeed, beyond GAO's bid protest function. *See Urban Group, Inc.; McSwain & Assocs., Inc.*, B–281352, B–281353, Jan. 28, 1999, 99–1 CPD ¶ 25 at 8.

Intervenor

One commenter asked that notices of protests be provided to the ATO to allow timely intervention. GAO believes that the requirement in the existing rule for notice to potential intervenors applies and that the existing rule is sufficient to require an agency to provide appropriate notice to the ATO.

Another commenter asked that GAO allow an ATO to intervene only if an employee representative failed to intervene. Two commenters asked GAO to provide standards that a putative employee representative intervenor would have to satisfy in order to be allowed to participate as an intervenor. Two commenters stated that the Federal agency should be permitted to set standards for the putative employee representative intervenor. Three commenters requested that GAO treat a union as presumptively authorized to intervene where it represents affected employees.

GAO believes that it is not possible to anticipate the variety of factual circumstances in which requests to intervene by either ATOs or employee representatives, or both, will occur and, therefore, it is not yet appropriate to set forth standards for how those situations will be resolved. At this time, therefore, GAO will implement the rule as proposed. GAO recognizes that the result may be that two presumably aligned parties (the ATO and the employee representative) may present somewhat different views to GAO. Notwithstanding any difficulty that this result could create, GAO believes that Congress intended that an employee representative could qualify as an intervenor whether or not the ATO is also a party (either as a protester or as an intervenor). In this connection, the conference report stated that "[a] person representing a majority of the employees would not have standing to file a protest, but would have the right to intervene in a protest filed by an interested party, including the ATO." H.R. Rep. No. 108–767, at 648 (2004), *reprinted* in 150 Cong. Rec. H9187, H9527 (daily ed. Oct. 8, 2004).

Protective Order Practice

As noted in the background to the proposed rule, GAO did not propose to address protective order issues in the rule changes, but GAO solicited comments on how those issues should be handled where an ATO and/or employee representative is participating in a protest. Two commenters urged GAO to require counsel for an ATO to apply for admission to a protective order under standards tailored to the role of ATO counsel. One additional commenter opposed requiring application for protective order admission by ATO counsel, but urged GAO to "admit" ATO counsel to the protective order if the agency provided certain protections against disclosure of protected material. One other commenter asked GAO to specify the sanctions that would be imposed on an employee representative or ATO if there were an unauthorized disclosure of protected material.

GAO believes that it is premature to provide definitive guidance regarding the access to protected information by the ATO, the employee representative, and their attorneys. Nonetheless, several points of guidance can be offered here. GAO believes that where counsel for the ATO or for the employee representative is not a government employee, that attorney will be required to apply for admission under existing standards established for admission to a protective order. As for the ATO and the employee representative, those individuals would presumably not be provided access to protected information under the protective order, just as non-attorneys in other protests cannot obtain such access. In cases where counsel for the ATO, or for the employee representative, is a government employee, GAO will proceed on a case-by-case basis, with appropriate weight given to the agency's views and, in particular, to the access that the agency has given the attorney to proprietary or source selection sensitive documents before the protest was filed. As the practice develops, and experience is gained by all sides, GAO intends to develop, and publish, uniform procedures that can be incorporated into the bid protest process and, if warranted, into GAO's Bid Protest Regulations.

Issues Not for GAO Review

One commenter requested that GAO specify that the prohibition against protests challenging the decision of an ATO to file (or not to file) a protest should explicitly reference its applicability to A–76 competitions involving more than 65 FTEs. GAO believes that the additional language is unnecessary because the proposed rule already encompasses the requested limitation in sec. 21.0. GAO believes that sec. 21.5(k) comports with the statutory intent that the decision of an ATO regarding whether to file a protest is not subject to GAO review.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Bid protest regulations, Government contracts, Government procurement.

■ For the reasons set out in the preamble, title 4, chapter I, subchapter B, part 21 of the Code of Federal Regulations is amended to read as follows:

PART 21—BID PROTEST REGULATIONS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: 31 U.S.C. 3551–3556.

■ 2. Amend § 21.0 by redesignating paragraph (a) as paragraph (a)(1) and adding new paragraph (a)(2), and by redesignating paragraph (b) as paragraph (b)(1) and adding new paragraph (b)(2) to read as follows:

§ 21.0 Definitions.

(a)(1) * * *

(2) In a public-private competition conducted under Office of Management and Budget Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, the official responsible for submitting the Federal agency tender is also an *interested party.*

(b)(1) * * *

(2) If an interested party files a protest in connection with a public-private competition conducted under Office of Management and Budget Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition and the official responsible for submitting the Federal agency tender as described in paragraph (a)(2) of this section may also be *intervenors.*

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■ 3. Amend § 21.5 by adding paragraph (k) to read as follows:

§ 21.5 Protest issues not for consideration.

* * * * *

(k) *Decision whether or not to file a protest on behalf of Federal employees.* GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.

Anthony H. Gamboa,

General Counsel, United States Government Accountability Office.

[FR Doc. 05–7489 Filed 4–13–05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19757; Directorate Identifier 2001–NM–273–AD; Amendment 39–14024; AD 2005–06–14]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model BAe 146 and Model Avro 146–RJ Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on March 28, 2005 (70 FR 15574). The error resulted in an incorrect AD number. This AD applies to certain British Aerospace Model BAe 146 and Model Avro 146-RJ series airplanes. This AD requires repetitive inspections for cracking of the outer links on the main landing gear side stays, and corrective actions if necessary. This AD also provides for optional terminating action for the repetitive inspections.

DATES: Effective May 2, 2005.

ADDRESSES: The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Washington, DC. This docket number is FAA–2004–19757; the directorate identifier for this docket is 2001–NM–273–AD.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On March 14, 2005, the FAA issued AD 2005–06–14, amendment 39–14024 (70 FR 15574, March 28, 2005), for certain Model BAe 146 and Avro 146–RJ series airplanes. This AD requires repetitive inspections for cracking of the outer links on the main landing gear side stays, and corrective actions if necessary. This AD also provides for optional terminating action for the repetitive inspections.

As published, the AD number of the final rule is incorrectly cited in the product identification section of the preamble and the regulatory information of the final rule. In the regulatory text, that AD reads "2005–06–04" instead of "2005–06–14."

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register.**

The effective date of this AD remains May 2, 2005.

PART 39—AIRWORTHINESS DIRECTIVES

§ 39.13 [Corrected]

■ In the **Federal Register** of March 28, 2005, on page 15576, in the first column, the product identification line of AD 2005–06–04 is corrected to read as follows:

* * * * *

2005–06–14 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–14024. Docket No. FAA–2004–19757; Directorate Identifier 2001–NM–273–AD.

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Issued in Renton, Washington, on April 5, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7483 Filed 4–13–05; 8:45 am]

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