

this conclusion. It pointed out that neither individual Federal employees, nor the in-house plan (the "Most Efficient Organization," or MEO), nor the employees' union representatives are offerors. In addition, GAO found that the MEO plan submitted in an A-76 competition is not an offer as defined under the FAR, because the MEO does not constitute a response to a solicitation (the solicitation currently applies only to private-sector competitors), nor would the MEO, if adopted, lead to formation of a contract, which is a mutually binding legal relationship to perform the services. Indeed, as GAO pointed out, no contract is awarded where the MEO prevails in the cost comparison. *See also American Fed'n of Gov't Employees*, B-223323, June 18, 1986, 86-1 CPD ¶ 572; *American Fed'n of Gov't Employees—Recon.*, B-219590.3, May 6, 1986, 86-1 CPD ¶ 436 (affirming an earlier dismissal).

The April 2002 report of the Commercial Activities Panel recommended that, in the context of improvements to the Federal government's process for making sourcing decisions, a way be found to level the playing field by allowing in-house entities to protest at GAO, as private-sector competitors are allowed to do. The report noted that, if a decision were made to permit the public-sector competitor to protest A-76 procurements, the question of who would have representational capacity to file such a protest would need to be carefully considered.

By making a number of changes from the predecessor Circular, the revised Circular may justify GAO reaching a different conclusion regarding the compliance of the in-house entity with CICA's definition of an "interested party." Unlike under the predecessor Circular, the revised A-76 framework contemplates that the in-house government entity will submit an "agency tender" in response to the solicitation that will be evaluated along with private-sector proposals for purposes of ultimately deciding which competitor, public or private, should be selected to perform the work. The agency tender will be developed by an Agency Tender Official (ATO), defined as an agency official with decision-making authority who "represents the agency tender during source selection." Revised Circular at D-2. If the agency tender prevails in the competition, the revised Circular provides that an "MEO letter of obligation" will be issued to an official responsible for performance of the MEO. Revised Circular at B-18. Under the revised Circular, this letter of

obligation is required to incorporate appropriate portions of the solicitation and tender. *Id.* Under the revised Circular, the public sector source's failure to perform in accordance with its obligations can result in a termination action. Revised Circular at B-20.

The ATO is among those defined under the revised Circular as a "directly interested party" for purposes of filing an agency-level protest of the performance decision. Revised Circular at D-4. The revised Circular also defines a "directly interested party" to include a "single individual appointed by a majority of directly affected employees as their agent." *Id.* In contrast to the ATO's defined role in the competition, the revised Circular does not define a role for this individual, other than in contesting agency actions taken in connection with an A-76 competition.

It is the cumulative legal impact of these changes that GAO is considering in assessing whether an in-house entity should have standing to file a bid protest at GAO when a competition is conducted under the revised Circular. Under the revised Circular, the agency tender appears to be treated more as an offer than under the predecessor Circular, and, if the source selection results in a decision to accept an agency tender, there will be a letter of obligation, which appears intended to bind the in-house entity, in at least a quasi-contractual way, to the terms of the solicitation and tender. In this regard, it may be viewed as relevant that GAO recently found that a public entity could be an interested party under CICA, even though, if successful in a competition, it would not be obtaining a contract. *Federal Prison Indus., Inc.*, B-290546, July 15, 2002, 2002 CPD ¶ 112. Further, as discussed in *Department of the Navy—Recon.*, B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 4, GAO reiterated that the in-house entity is essentially a competitor and that in preparing the in-house plan for performance, the MEO team members "functioned * * * as competitors."

GAO recognizes that there are various ways to resolve the legal question of interested-party status for in-house entities under the revised Circular. One way would be through case law. That is, GAO could simply wait until a protest is filed by an ATO or another individual or entity representing in-house interests; in response to a request for dismissal on standing grounds (or at its own initiative), GAO could ask the parties to address the matter in submissions and GAO could then issue a decision resolving the protester's interested-party status. Alternatively, GAO could amend its bid protest regulations to address the

impact of the revised Circular, or it could issue a notice in the **Federal Register** announcing its legal conclusion. Another alternative would be for Congress to amend CICA's definition of an interested party for purposes of the filing of protests. Obviously, Congress could act even if GAO does not, and, indeed, legislative action would override action by GAO through its regulations or its case law. Finally, if it is found that GAO does not have authority under CICA to consider such protests, GAO could potentially consider protests by the ATO or another individual or entity representing in-house interests as "non-statutory protests," if agencies agree in writing to have GAO decide the protests.

The purpose of this notice is to solicit comments from the public as to which action, if any, GAO should take. GAO would welcome comments from contracting agencies, other Federal agencies, individual Federal employees, Federal employee unions, contractors and other private-sector firms, attorneys (from all sectors), and others wishing to express a view. The most helpful views will be clear and concise, and will reflect familiarity with GAO's bid protest regulations, practice, and case law, as well as with the Circular A-76 framework. The key questions GAO is seeking views on are: (1) What method of deciding the matter GAO should use: case law (that is, wait for a protest presenting the question to be decided by GAO), amendment to the bid protest regulations, a notice in the **Federal Register** announcing GAO's legal conclusion, or no action by GAO; and (2) if GAO should act, what its decision should be—specifically, whether the in-house competitor should, or should not, be considered an interested party, and, if so, who should be viewed as having representational capacity to file a protest at GAO on behalf of the in-house competitor.

It would also be helpful to know the commenters' views on whether counsel for the ATO or the appointed individual would need to apply for admission (and what conditions might affect the likelihood of that counsel being admitted) to a protective order that GAO would issue (as it normally does) to limit access to nonpublic information regarding the procurement. *See* 4 CFR 21.4.

Finally, commenters may wish to address the impact, if any, on their view of the holding from the Court of Appeals for the Federal Circuit (consistent with GAO's view, as explained above) that Federal employees and their union do not qualify as interested parties to protest a decision pursuant to Circular