

Decision

Matter of: Argus Secure Technology, LLC

File: B-419422; B-419422.2

Date: February 22, 2021

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DIGEST

Protest challenging procurement conducted by the Office of Administration, Executive Office of the President, is dismissed because the entity is not a federal agency as defined by the Federal Property and Administrative Services Act of 1949, and therefore the challenged actions are not matters within GAO's bid protest jurisdiction.

DECISION

Argus Secure Technology, LLC, of Vienna, Virginia, protests the establishment of a blanket purchase agreement (BPA) with GCyber, LLC, of Arlington, Virginia, under GCyber's General Services Administration Federal Supply Schedule contract, pursuant to request for quotations (RFQ) No. 1316020Q0001EOP, issued by the Office of Administration, Executive Office of the President, for cybersecurity support services. Argus contends that the evaluation of vendors' quotations and resulting selection decision were improper.

We dismiss the protest.

BACKGROUND

The Executive Office of the President (EOP) was created pursuant to the Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (1939), and Reorganization Plan No. 1 of 1939. 53 Stat. 1423 (1939). The function of the EOP is to support the work of the President of the United States at the center of the executive branch of the

federal government. The EOP includes the following offices and entities: White House Office;¹ Council of Economic Advisors; Council on Environmental Quality; President's Intelligence Advisory Board; Executive Residence; Domestic Policy Council; National Security Council; Office of Intergovernmental Affairs; Office of Management and Budget; Office of National Drug Control Policy; Office of Public Engagement; Office of Science and Technology Policy; Office of the United States Trade Representative; Office of the Vice President; and--relevant to the protest here--Office of Administration. www.whitehouse.gov/administration/executive-office-of-the-president/ (list visited Feb. 11, 2021); see also The United States Government Manual, www.usgovernmentmanual.gov/ (last visited Feb. 11, 2021); Harold C. Relyea, Cong. Research Serv., 98-606 GOV, *The Executive Office of the President: An Historical Overview* (2008).

The Office of Administration was created pursuant to Executive Order No. 12028 to be the entity which provides common administrative support to all of the EOP.² Executive Order No. 12028 at §§ 2, 4(a), 42 Fed. Reg. 62,895, 62,896 (Dec. 12, 1977); see also Message of the President Transmitting Reorganization Plan No. 1 of 1977, July 15, 1977 (3 U.S.C. note prec. § 101) (“I propose to combine administrative support operations into a Central Administrative Unit in EOP to provide . . . administrative services common to all EOP entities.”). Executive Order No. 12028 also specified that the Office of Administration director reported to the President and, in operating the Office of Administration, could “do all other things that the President, as head of the Office of Administration, might do.” Executive Order No. 12028 at §§ 2, 4(a). Executive Order No. 12028 thereafter became the basis of the Reorganization Plan No. 1 of 1977, which the Congress enacted into statute. 91 Stat. 1633 (1977); 3 U.S.C. note prec. § 101. The Office of Administration was codified as follows:

Section 2. Establishment of an Office of Administration.

There is hereby established in the Executive Office of the President the Office of Administration which shall be headed by the President. There

¹ The White House Office, also established by the Reorganization Plan No. 1 of 1939, is an entity within the EOP headed by the White House chief of staff, includes the President's senior advisors, and reports directly to the President. Almost all White House Office staff are political appointees who do not require Senate confirmation and can be dismissed at the discretion of the President. Harold C. Relyea, Cong. Research Serv., 98-606 GOV, *The Executive Office of the President: An Historical Overview* at 28 (2008).

² In addition to conducting procurements, the Office of Administration provides support services in the following administrative areas: personnel management services; financial management services; data processing; library, records, and information services; office services and operations (e.g., mail, printing, duplication, graphics). Executive Order No. 12028 at § 3(b); see also *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 566 F.3d 219, 224 (D.C. Cir. 2009).

shall be a Director of the Office of Administration. The Director shall be appointed by the President and shall serve as chief administrative officer of the Office of Administration. The President is authorized to fix the compensation and duties of the Director.

The Office of Administration shall provide components of the Executive Office of the President with such administrative services as the President shall from time to time direct.

3 U.S.C. note prec. § 101.

On May 28, 2020, the Office of Administration issued the RFQ here for cybersecurity services for the EOP and all supported component entities.³ *Id.* at 1, 3, 54. On November 5, the Office of Administration selected GCyber for BPA award. *Id.*, Tab 8, Source Selection Decision Document (SSDD) at 9-10. On November 16, Argus filed this protest with our Office.

DISCUSSION

Argus raises various issues regarding the evaluation of vendors' quotations and resulting award decision. First, Argus contends the determination that Argus's technical quotation exceeded the 60-page limit was in error. Argus also alleges the evaluation of its quotation was unreasonable and disparate. Had a proper evaluation been conducted, Argus argues, it would have been selected for the BPA award. Protest at 10-25; Comments and Supp. Protest at 4-26. The EOP responded to the protest and argues that Argus's assertions are without merit. Memorandum of Law (MOL) at 1-10; Contracting Officer's Statement (COS) at 1-16. Additionally, both the EOP and intervenor GCyber contend that GAO is without authority to review the protest here because the Office of Administration is not a federal agency for purposes of our Office's bid protest jurisdiction.⁴ For the reasons discussed below, we agree.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open

³ The record also reflects that the contracting officer for the procurement was a member of the procurement and contract management division within the Office of Administration. Agency Report (AR), Tab 1, RFQ at 5, 7.

⁴ In its report to our Office responding to Argus's protest, the EOP stated that, in referring to itself, the use of the term "agency" was used "to be consistent with standard terminology used before the GAO" and was not meant to imply that the protest here was in fact subject to GAO's bid protest jurisdiction. MOL at 1 n.1. Since our Office is charged by statute to only decide protests over which we have jurisdiction, we asked all parties to brief the jurisdictional issue raised by the agency. GAO Notice to Parties Regarding Bid Protest Jurisdiction, Jan. 4, 2021.

competition are met. *Honeywell Tech. Solutions, Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. As relevant here, CICA defines a protest as a written objection by an interested party to a solicitation or other request by a federal agency for bids or proposals for a contract for the procurement of property or services, or an award or proposed award of such a contract. 31 U.S.C. §§ 3551(1), 3553. Thus, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. *S.E. James & Co.*, B-415733, Feb. 7, 2018, 2018 CPD ¶ 69 at 2; *Americable Int'l, Inc.*, B-251614, B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336 at 2.

CICA adopted the definition of a federal agency set forth in the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 102. 31 U.S.C. § 3551(3) (“The term ‘Federal agency’ has the meaning given such term by section 102 of title 40.”). FPASA defines a federal agency as “an executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the direction of the Architect of the Capitol).” 40 U.S.C. § 102(5). An executive agency is defined as “an executive department or independent establishment in the executive branch of the Government,” or “a wholly owned Government corporation.” *Id.* § 102(4). FPASA, however, does not further define either the term “executive department” or “independent establishment.”⁵

Based on the statutory guidance set forth above, we conclude that the Office of Administration is neither an executive department nor a wholly owned government corporation, nor does the protester suggest otherwise. By process of elimination, our ability to review Argus’s protest exists if, and only if, the Office of Administration is an “independent establishment” for purposes of 40 U.S.C. § 102(4)—and thereby a federal agency for purposes of CICA. For the reasons set forth below, we find that the Office of Administration is not an independent establishment for the purposes of our bid protest jurisdiction.⁶

⁵ Likewise, the legislative history of FPASA does not elaborate on the definitions of “federal agency” or “executive agency” contained in the Act. See H.R. Rep. No. 670 at 8 (1949), reprinted in 1949 U.S.C.C.A.N. 1475, 1481-82 (failing to define federal agency or executive agency). We note, however, that 5 U.S.C. § 101 sets forth those entities deemed executive departments (*e.g.*, the Department of State, the Department of the Treasury), and does not include the Office of Administration. Additionally, as discussed below, 5 U.S.C. § 104 provides a definition of the term “independent establishment” for that title’s purposes.

⁶ Moreover, in light of our determination that the proper inquiry is whether the Office of Administration is a federal agency for purposes of 40 U.S.C. § 102, we need not decide whether the EOP or any of its component entities are federal agencies for any other statutory purpose.

First, the Office of Administration's enabling statute does not identify it as an independent establishment.⁷ As set forth above, the Office of Administration, which is headed by the President, exists to provide the various components of the EOP with "such administrative services as the President shall from time to time direct." 3 U.S.C. note prec. § 101. We conclude that the congressional decision not to denote the Office of Administration as an independent establishment indicates that it is not such an entity. See *S.E. James & Co.*, B-415733, Feb. 7, 2018, 2018 CPD ¶ 69 at 2 (finding that, based on their enabling statutory provisions, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) were not defined as executive agencies for purposes of GAO's bid protest jurisdiction); see also *Information Experts, Inc.*, B-413887, B-413887.2, Dec. 30, 2016, 2017 CPD ¶ 16 at 5 (finding GAO had bid protest jurisdiction over the Consumer Financial Protection Board (CFPB) because CFPB's enabling statute defined it as an executive agency); and *Emery Worldwide Airlines, Inc., v. United States*, 49 Fed. Cl. 211, 220 (2001) (finding that the United States Postal Service (USPS) was an independent establishment for purposes of FPASA because USPS was defined as an independent establishment in its enabling legislation).

Additionally, the Office of Administration has been found not to be an establishment in the executive branch under any other similar statute. In *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, *supra* ("*CREW*"), a nonprofit public interest group brought a Freedom of Information Act (FOIA) suit against the Office of Administration, seeking to compel the disclosure of documents related to the EOP's e-mail management system.⁸ As detailed below, the D.C. Circuit held that the Office of Administration lacked the substantial independent authority required to be an agency covered by FOIA.

The court in *CREW* found that, by its terms, FOIA applied to an "agency," defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* at 222, *citing* 5 U.S.C. § 552(f)(1). In determining whether the Office of Administration was an executive branch establishment and/or agency, the court relied upon the Supreme Court decision in *Kissinger v. Reporters Committee for Freedom of the Press*, which held that "the President's immediate personal staff or units in the Executive Office [of the President] whose sole function is to advise and assist the President" are not included within the term "agency" under FOIA. *CREW, supra* at 222, *citing Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156

⁷ For a listing of executive branch independent agencies and government corporations, see The United States Government Manual, www.usgovernmentmanual.gov/ (last visited Feb. 11, 2021).

⁸ The record reflects that the Office of Administration maintained the e-mail management system for the EOP. *CREW, supra* at 220-221.

(1980). The court in *CREW* then concluded that because the Office of Administration did not wield substantial authority independently of the President, and provided to the President only operational and administrative support, the Office of Administration was not an agency covered by FOIA.⁹ *Id.* at 224.

Further, we find the Office of Administration is not an “independent establishment” as defined in other parts of the United States Code. Specifically, Title 5 defines “independent establishment” to mean,

(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and

(2) the Government Accountability Office.

5 U.S.C. § 104.

It is clear, we think--and the protester fails to explain otherwise--that the Office of Administration is not within the compass of the Title 5 definition of “independent establishment.” See *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582 (D.C. Cir. 1990) (“It would be a tall piece of statutory construction for a court to say that an ‘establishment in the executive branch’ as used in [one statute] is not an ‘establishment in the executive branch’ within the meaning of” another statute), citing Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 224 (1967) (“when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things”).

Lastly, we note that, as a matter of statutory construction, when Congress has referred to the term “independent establishment,” it has distinguished such use when referring to the Office of Administration. Specifically, Congress has authorized “[t]he head of any department, agency, or independent establishment of the executive branch of the Government [to] detail, from time to time, employees of such department, agency, or establishment to the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, and the *Office of Administration*.” 3 U.S.C. § 112 (emphasis added). “That Congress distinguished the [Office of Administration] from the independent establishments, whatever they may be, suggests that Congress does not regard the [Office of Administration] to be an independent establishment, as it uses that term.” *Haddon v. Walters*, 43 F.3d 1488,

⁹ Moreover, as FOIA’s definition of “agency” includes, among other things, an “establishment in the executive branch,” in order for the court in *CREW* to determine that the Office of Administration was not an agency, it can be inferred that the court also concluded that the Office of Administration was not an executive branch establishment. *Id.* at 223-224.

1490 (D.C. Cir 1995) (holding that the White House Executive Residence was not an independent establishment as defined in 5 U.S.C. § 104).

In sum, we find that the Office of Administration is not an independent establishment for purposes of 40 U.S.C. § 102. As the Office of Administration is also not an executive department or wholly owned government corporation, it is therefore not an executive agency (or federal agency) subject to our bid protest jurisdiction.¹⁰

Argus does not dispute that the Office of Administration is not an independent establishment for purposes of 40 U.S.C. § 102. Rather, the protester argues that the correct inquiry is whether the EOP is an independent establishment.¹¹ Argus Supp. Comments, Jan. 19, 2021, at 1. In support thereof, Argus points to the fact that the RFQ stated that the EOP was “establishing a single award BPA [to] support the effort to provide necessary [c]ybersecurity [s]ervices to assist in meeting the operational needs” of the EOP’s technology community. *Id.* at 2, *citing* AR, Tab 1, RFQ at 5. Argus also argues that EOP is an independent establishment, because it is an establishment in the executive branch, “when that phrase is given its ordinary meaning.” *Id.* at 3. Lastly, Argus points to FOIA’s definition of “agency,” as “any executive department, military department, Government corporation, Government controlled corporation, or *other establishment in the executive branch of the Government (including the Executive Office of the President)*, or any independent regulatory agency.” *Id.* at 5, *citing* 5 U.S.C. 552(f)(1). We disagree.

First, the protester would have us focus our review on the EOP as the alleged procuring activity. As set forth above, the record reflects the procurement here was conducted by the Office of Administration. In this regard, the solicitation was issued by the Office of Administration, and the contracting officer for the procurement--who was also the procurement’s source selection authority--is a member of the Office of Administration. RFQ at 1, 3, 5, 7; AR, Tab 8, SSDD at 9-10. Notwithstanding the RFQ provision quoted by Argus above, the record as a whole reflects that the EOP did not conduct the procurement here, but rather, was the “customer” on whose behalf the Office of Administration performed the procurement.

¹⁰ The EOP also argues that because the President is the statutory head of the office, procurements and other activities conducted by the Office of Administration are “presidential actions” and not subject to review without an express statement from Congress to that effect. Supp. MOL, Jan. 12, 2021, at 7-8, *citing Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992) (“We would require an express statement by Congress before assuming [the Administrative Procedure Act] intended the President’s performance of his statutory duties to be reviewed . . .”). As we have found the Office of Administration is not an independent establishment and/or executive agency for purposes of 40 USC § 102, we need not address whether the Office of Administration’s activities are in fact “presidential actions.”

¹¹ Argus also points to the fact that the EOP’s enacting statute does not exempt it from procurement laws and regulations. Argus Supp. Comments, Jan. 12, 2021, at 3-4.

Moreover, as set forth above, the EOP is a unique amalgamation of offices and entities that directly support the work of the President of the United States. Consequently, federal courts have routinely examined whether individual components within the EOP qualify as “independent establishments,” or as “agencies,” rather than examining the EOP’s status as a whole. For example, the Supreme Court in *Kissinger v. Reporters Comm. for Freedom of the Press*, found that the Office of the President (*i.e.*, the White House Office), while within the EOP, was not an agency subject to FOIA. Likewise, the D.C. Circuit’s decision in *CREW* includes a detailed review of which units of the EOP have been found to be agencies subject to FOIA (*e.g.*, Office of Science and Technology, Office of Management and Budget, Council on Environmental Quality), as compared to those EOP entities that are not agencies subject to FOIA (*e.g.*, Council of Economic Advisors, the White House Executive Residence).

Similarly, the D.C. Circuit held in *United States v. Espy* that “it has never been thought that the whole Executive Office of the President could be considered a discrete agency,” for purposes of FOIA. *Id.*, 145 F.3d 1369, 1373 (D.C. Cir. 1998); *see also Electronic Privacy Info. Center v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 318 (D.D.C. 2017) (rejecting the claim that the “entire EOP,” as a parent organization, was an agency for purposes of the Administrative Procedure Act; “this view of the EOP has been expressly rejected by the D.C. Circuit and is at odds with the practical reality that the D.C. Circuit has consistently analyzed the agency status of EOP components on a component-by-component basis”). Quite simply, our review focuses upon the specific EOP organization that conducted the procurement here, which the record reveals was the Office of Administration.

In sum, we find the Office of Administration is not an independent establishment or otherwise an executive agency (or federal agency) for purposes of 40 U.S.C. § 102 (and thus, CICA). Consequently, we are without jurisdiction to review the protest here.¹²

The protest is dismissed.

Thomas H. Armstrong
General Counsel

¹² Pursuant to GAO’s Bid Protest Regulations, our Office also has the ability to consider a protest on a nonstatutory basis, when the contracting “agency” agrees in writing to have us do so. 4 C.F.R. § 21.13(a). The Office of Administration has not requested that our Office review the protest here under that authority.