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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: John P. Santry--Designated Employee Agent

File: B-402827

Date: August 2, 2010

John P. Santry, Designated Employee Agent, American Federation of Government Employees, the protester.
Col. Thomas J. Hasty III, Gary R. Allen, Esq., and Thomas Biediger, Esq., Department of the Air Force, for the agency.
Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The statutory requirements for public-private competition, codified at 10 U.S.C. § 2461, regarding functions performed by Department of Defense "civilian employees" do not apply to non-appropriated fund employees.

2. Where a solicitation seeking private contractor proposals for food services at Air Force bases is amended to provide that appropriated fund employees who are currently performing the solicited functions will not be "displaced, reassigned, subjected to reduction in force, or otherwise adversely affected," agency's procurement actions do not constitute conversion of those functions to private sector performance.

DECISION

John P. Santry--Designated Employee Agent, President of the American Federation of Government Employees Local 1764, protests the Department of the Air Force's issuance of request for quotations (RFQ) No. F41999-10-Q-0495,[1] which seeks

[1] Santry's protest mistakenly references solicitation No. F41999-10-R-0003. There is no dispute that the protest was intended to reference, and actually challenges solicitation No. F41999-10-Q-0495; accordingly, our decision addresses that solicitation. Additionally, although the cover letter accompanying the solicitation indicates that the solicitation was issued by the Air Force Non-Appropriated Fund Purchasing Office, the solicitation contemplates acquisition of what the agency itself

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submission of quotations from private-sector food service contractors to provide various food service activities at specified Air Force bases (AFB).[2] The solicitation was issued in April 2010, as phase I of an Air Force initiative referred to as the food transformation initiative (FTI).[3] Pursuant to the solicitation, vendors are required to submit quotations for "core" requirements, which the agency defines as "operation of the mission essential [appropriated fund] dining facilit[ies] at each installation" along with providing non-appropriated fund "catering operations," and vendors may, at their option, submit quotations for "optional" food service operations at base bowling alleys, golf courses, clubs, and similar establishments. Contracting Officer's Statement at 2; see generally RFQ, Statement of Work ¶¶ 1.1-1.3. The agency states that a contract for the optional operations "may be awarded at the discretion of the local installation." Contracting Officer's Statement at 2.

Santry protests that, by seeking proposals from private-sector contractors, the agency has failed to comply with the statutory requirements codified at 10 U.S.C. § 2461, as amended by the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, Pub. L. No. 111-84, 123 Stat. 2191 (2009), in that the agency is not conducting a public-private competition for performance of the food service functions. As discussed below, the agency's actions do not violate the statutory requirements of 10 U.S.C. § 2461.

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describes as "mission essential" food services for Air Force personnel. See Contracting Officer's Statement, at 2. Accordingly, for purposes of this decision, we view the procurement as being conducted by the Air Force. See Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; cf. LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45.

[2] The AFBs include: Travis AFB in California; Elmendorf AFB in Alaska; Fairchild AFB in Washington; Patrick AFB and MacDill AFB in Florida; and Little Rock AFB in Arkansas.

[3] The agency states that the objective of the FTI is "to transform appropriated fund and non[-]appropriated fund feeding capabilities into a single feeding platform to more effectively serve active duty airmen and other installation personnel," and that "[t]he [FTI] concept envisions an enterprise approach featuring 'campus' style food outlets to improve the quality, variety and availability of food for Airmen and their Families, while ensuring [that] combat feeding capabilities are maintained." Agency's Amended Request for Dismissal, June 15, 2010, at 1. Although the current solicitation, referred to as phase I of the FTI, applies only to a limited number of facilities, there is no dispute that the Air Force intends to implement the FTI agency-wide in similar, upcoming procurements.

BACKGROUND

Historically, controversy has surrounded the federal government's decisions to perform various activities using private-sector contractors (that is, "outsourcing") or alternatively, to perform activities in-house using federal government personnel (that is, "in-sourcing"). See, e.g., OMB Circular A-76: Oversight and Implementation Issues, (GAO/T-GGD-98-146, June 4, 1998); Defense Outsourcing: The OMB Circular A-76 Policy, Congressional Research Service Report for Congress, No. RL30392, June 30, 2005. In order to advise agencies on this matter, the Office of Management and Budget (OMB) has issued Circular A-76; that Circular was first published in 1966, and has been updated/revised several times since, with the most recent complete version published on May 29, 2003.

With regard to the "in-sourcing" versus "outsourcing" issue, Congress has provided various statutory directions to federal agencies, including the legislation on which Santry's protest relies, codified at 10 U.S.C. § 2461, which states:

> (a) Public-Private Competition. (1) No function of the Department of Defense performed by Department of Defense civilian employees may be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that –
>
> > (A) formally compares the cost of performance of the function by Department of Defense civilian employees with the cost of performance by a contractor; [and]
> >
> > (B) creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A-76, as implemented on May 29, 2003, or any successor circular . . . .

10 U.S.C.A § 2461(a) (West Supp. 2010) (underlining added).

In this regard, the referenced May 29, 2003 version of OMB Circular A-76 provides the following definition of the term "civilian employee," stating:

> **Civilian Employee.** An individual who works for a federal agency on an appointment without time limitation who is paid from appropriated funds, which includes working capital funds. A foreign national employee, temporary employee, term employee, non-appropriated fund employee, or uniformed personnel is not included in this definition.

OMB Circular A-76 (May 23, 2003) (underlining added).

DISCUSSION

Santry's protest is based on his representation of both non-appropriated fund employees and appropriated fund, wage grade employees who are currently performing activities that fall within the scope of the solicitation's statement of work.[4] Santry asserts that both groups of employees are "civilian employees" and, thus, subject to the protections of 10 U.S.C. § 2461. Accordingly, Santry asserts that the Air Force's ongoing efforts to award a contract for the functions performed by either group of employees triggers the statutory requirement to conduct a public-private competition.[5] We disagree.

Non-Appropriated Fund Employees

As discussed above, the statutory provisions of 10 U.S.C. § 2461 expressly reference the most recent version of Circular A-76, as revised in May 2003, and directs that agencies perform certain activities "in accordance with" that Circular. Accordingly, in interpreting the provisions of 10 U.S.C. § 2461, we consider and apply the provisions of the referenced Circular.[6]

As also discussed above, Circular A-76 expressly defines the term "civilian employee" to exclude non-appropriated fund employees, unambiguously stating:

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[4] The agency states that there are 18 appropriated fund, wage grade employees at the various designated facilities who are currently performing functions within the scope of the solicitation, and an unspecified number of non-appropriated fund employees. Contracting Officer's Statement at 2. Santry asserts there are approximately 60 non-appropriated fund employees at Travis AFB, alone, who perform functions that fall within the scope of the solicitation. Protest at 2.

[5] More specifically, Santry asserts that "[t]he outsourcing of appropriated and non-appropriated functions without public-private competition, in accordance with [OMB Circular] A-76 procedures[,] is a violation of [the] 10 U.S.C. [§] 2461 prohibition against direct conversion of DOD civilian employees," and Santry requests that the agency be directed to "suspend/cancel the acquisition process . . . and conduct a public/private competition in accordance with [OMB] Circular A-76 as implemented on May 29, 2003." Protest at 2.

[6] In this regard, we note that Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts a statute. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975). Similarly, where Congress adopts a new law that incorporates sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law insofar as it affects the new statute. Lorillard v. Pons, 434 U.S. 575, 580-581 (1978).

"A . . . non-appropriated fund employee . . . is not included in this definition."[7] Santry has made various arguments, essentially maintaining that we should not apply this unambiguous definition.[8] We have considered all of Santry's arguments and find no basis to ignore the plain language definition of "civilian employee" discussed above.

Accordingly, the statutory requirement to conduct public-private competitions is not triggered by the agency's procurement actions to "outsource" functions that are being performed by non-appropriated fund employees. To the extent Santry's protest is based on the agency's ongoing actions to award a contract for functions currently performed by non-appropriated fund employees, the agency's decision not to conduct a public-private competition does not violate the statutory requirements of 10 U.S.C. § 2461, and Santry's protest fails to state a valid basis.

Appropriated Fund, Wage Grade Employees

As noted above, the record indicates there are 18 appropriated fund, wage grade employees who are performing functions that fall within the scope of the solicitation. Following submission of Santry's protest, the agency took what it acknowledged was "corrective action," amending the solicitation to state:

> Appropriated fund Wage Grade (WG) employees will be considered within the military structure. No WG employee will be displaced, reassigned, subjected to reduction in force, or otherwise adversely affected by the implementation of FTI phase I.

Letter to Offerors, June 30, 2010, ¶1.a.

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[7] The May 2003 version of Circular A-76 also contains the definition of a broader term, "Government personnel," which includes non-appropriated fund employees.

[8] For example, Santry references various provisions of Title 5 of the United States Code relating to federal employees; the legislative history of 10 U.S.C. § 2461; and our Office's prior decision in Sodexho Managmeent, Inc., B-289605.2, July 5, 2002, 2002 CPD ¶ 111. First, we think the general provisions in Title 5 do not address the situation here, and cannot substitute for the more specific, directly applicable, and later enacted provisions of 10 U.S.C. § 2461. Further, we think this statute, and the provisions of Circular A-76 that it incorporates, can be interpreted by applying the plain meaning of the language contained therein; that said, we see nothing in Santry's assertions regarding the legislative history that causes us to reach a different conclusion. Finally, we believe Santry mischaracterizes our holding in Sodexho. In any event, we note that the version of Circular A-76 that was applicable in 2002, when we decided Sodexho, did not contain a definition of the term "civilian employee." Following our decision in that case, the Circular was revised to, for the first time, include the definition of that term which we apply here.

Consistent with this solicitation amendment, the agency states that the appropriated fund employees currently performing functions within the scope of the solicitation "will continue to be employed in the respective facilities and will work alongside military members and the contractor's employees in providing food services." Contracting Officer's Statement at 2. The agency elaborates that such employees "will continue to report to and remain under the operational control of the Force Support Squadron commander, but may receive tactical direction from the contractor." Id. at 3.

Notwithstanding the agency's corrective action and representations, Santry continues to assert that the agency's procurement of the solicited services from private-sector contractors, without conducting a public-private competition, violates the provisions of 10 U.S.C. § 2461. Specifically, while acknowledging that "the agency does not plan to fire these employees at this time or reassign them to non-food service positions," Santry nonetheless continues to assert that the appropriated fund employees "will be affected in terms of duties assigned, supervision, functions performed, pay and benefits, and work locations." Protester's Response to Motion to Dismiss, July 12, 2010, at 11.

For example, Santry complains, among other things, that "insertion of a contractor into a supervisory role of any kind over [appropriated fund] employees will cause great confusion." Id. Similarly, Santry asserts that the food service functions performed by the employees will change, noting that "[c]urrently, the Wage Grade 8 cooks develop new recipes or revise current recipes, independently plan and coordinate the preparation of entire meals, perform kitchen management, and provide guidance to lower grade civilian and military cooks." Id. at 13. Santry complains that, following award of a contract, the cooks "will be unlikely to develop new recipes and not called upon to prepare entire meals, perform kitchen management, or provide guidance to lower grade cooks," thus "put[ting] them at risk for being downgraded." Id. Finally, Santry asserts that the various facilities' hours of operation could change under contract management, thereby changing the work hours or assigned location of the employees. Id. at 13-14. Based on these arguments, Santry asserts that the appropriated fund employees will be "adversely affected." Id. at 14.

Our Office has previously considered protests that similarly challenge an agency's alleged conversion of government functions to contractor performance. In Mark Whetstone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ 93, we considered a protest challenging the Department of Homeland Security's issuance of a solicitation to process that agency's backlog of Freedom of Information Act requests--services that were then being performed exclusively by government employees. There, as here, the record established that the jobs of the employees performing those services were not at risk; rather, the agency was seeking to supplement the existing federal employee workforce. We concluded that there was no conversion of work to the private sector since the federal employees' jobs were

not at stake. Id. at 5-6; see also B.R. Hardison--Designated Employee Agent, B-311275, May 29, 2008, 2008 CPD ¶ 145 at 3 (where no federal employee jobs are at risk, there is no prejudice to the protester).

Similarly, in Bernard Humbles--Designated Employee Agent, B-401349, June 8, 2009, 2009 CPD ¶ 125, we considered a protest challenging the Department of Veterans Affairs decision to contract for headstone setting services at a National Cemetery--a task that was included within the job descriptions of federal employee cemetery caretakers. There, as here, the record established that none of the employees at issue would be "displaced, reassigned, subject to reduction in force, or otherwise adversely affected by the management's decision to contract out [the services]." Id. at 3. In dismissing that protest, we specifically acknowledged that "the array of day-to-day tasks performed by the [federal employees] will change to some degree as a consequence of the agency's decision to use a contractor to perform headstone setting work," but noted that the employees would remain employed and would continue to perform other aspects of their job descriptions. Id. at 4. While further noting that "an agency's decision to fundamentally change the nature of the work performed by federal employees coupled with its decision to hire a contractor could rise to the level of a conversion," we concluded that the changes contemplated were insufficient to reach that level. Id.

Here, as discussed above, the agency has amended the solicitation to expressly provide that the appropriated fund employees currently performing functions within the scope of the solicitation will not be "displaced, reassigned, subjected to reduction in force, or otherwise adversely affected" thus ensuring that the appropriated fund employees' jobs are not at risk. Santry acknowledges that, in his words, the agency "does not plan to fire" the employees, nor to reassign them to non-food service positions. We have considered all of Santry's assertions regarding the potential changes that may occur, and conclude that the types of changes reasonably contemplated by the agency's procurement actions do not rise to the level of a conversion. Accordingly, to the extent Santry's protest is based on the alleged conversion of the functions performed by appropriated fund employees to contractor performance, the protest fails to state a valid basis.

In summary, we conclude that: (1) the statutory requirements codified at 10 U.S.C. § 2461 regarding conversion of functions performed by "civilian employees" are not applicable to functions performed by non-appropriated fund employees, since OMB Circular A-76 (May 23, 2003), expressly excludes non-appropriated fund employees from the definition of "civilian employees"; and (2) where the agency has amended the solicitation to provide that no appropriated fund employee will be "displaced, reassigned, subjected to reduction in force, or otherwise adversely affected," the

agency's ongoing procurement actions do not constitute conversion of the functions performed by those employees to private sector performance.

The protest is denied.

Lynn H. Gibson
Acting General Counsel