



Decision

Matter of: Bernard Humbles--Designated Employee Agent

File: B-401349

Date: June 8, 2009

Bernard Humbles, Designated Employee Agent, the protester.
Dennis Foley, Esq., Department of Veterans Affairs, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed by Designated Employee Agent challenging agency's decision to contract for headstone setting services without conducting a public-private competition is dismissed where the protester represents a group of employees whose positions are not at risk as a consequence of the contemplated contracting decision.

DECISION

Bernard Humbles--Designated Employee Agent protests the decision by the Department of Veterans Affairs to contract for headstone setting services at the Fort Logan National Cemetery, Denver, Colorado. Mr. Humbles contends that contracting for headstone setting services constitutes an unlawful direct conversion of a function or activity performed by federal employees who work at Fort Logan as cemetery caretakers.

We dismiss the protest.

Fort Logan National Cemetery was established as a National Cemetery in 1950. The cemetery sits on 214 acres, has approximately 77,000 headstones, and, on average, holds 3,650 burials and interments per year (an average of approximately 14 per day). Of the 126 national cemeteries, Fort Logan is ranked seventh in terms of interment operations.

According to the agency, 32 full-time equivalent government employees work at Fort Logan, including four cemetery caretakers. As reflected in their position descriptions, cemetery caretakers are primarily responsible for interments, grounds

maintenance, headstone setting and maintenance, facility maintenance, and operator maintenance (maintenance on vehicles and equipment used during daily cemetery operations).

In a letter dated April 23, 2009, the Fort Logan National Cemetery Director informed Mr. Humbles of the agency's decision to contract for headstone setting services in an effort to save costs. In this regard, the Director informed Mr. Humbles that "this action will not have an impact on the grade, pay or work schedules of existing permanent employees at the cemetery. There may be an impact on future temporary hiring." Protest, Attach. A. In a second letter to Mr. Humbles dated April 30, the Director further indicated that "no unit employee will be displaced, reassigned, subject to reduction in force, or otherwise adversely affected by the management's decision to contract out [headstone setting services]. . . . By contracting out this task, we will free staff to perform other critical tasks that will enable the cemetery to meet or exceed [National Cemetery Administration's] Operational Standards and Measures to achieve National Shrine Status." Protest, Attach. B. During the course of this protest, the agency has represented that if it contracts for the headstone setting services, the cemetery caretakers, who are involved with many other aspects of cemetery operations, as reflected by their position descriptions, will continue to perform work in support of grounds maintenance and interment operations. Agency E-mail Response to Questions for the Record, May 14, 2009. Moreover, the agency has indicated that in the event the agency proceeds with hiring a contractor to perform headstone setting at Fort Logan, the headstone setting and maintenance work will not be removed from the cemetery caretaker position description; rather, the caretakers will continue to perform headstone maintenance and they will "remain available to perform headstone setting duties as the need arises." Agency E-mail Response to Questions for the Record, June 3, 2009.

Mr. Humbles argues that transferring the Fort Logan headstone setting work from the cemetery caretakers to a contractor is unlawful because the decision was not made based on the results of a public-private competition. Specifically, Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 739(a), 121 Stat. 1844, 2029-31 (2008) prohibits the conversion of "an activity or function" performed by federal employees to a contractor where the conversion is not based on the results of a public-private competition.¹

¹ Section 739(a) of the Consolidated Appropriations Act provides that:

(1) Notwithstanding any other provision of law, none of the funds appropriated by this or any other Act shall be available to convert to contractor performance an activity or function of an executive agency that, on or after the date of enactment of this Act, is performed by more than 10 Federal employees unless--

(continued...)

The agency argues that Mr. Humbles' protest should be dismissed because he does not qualify as an "interested party" to challenge the agency's decision to contract with a private sector firm to perform the headstone setting work. Relying on our decision in Mark Whetstone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ 93, the agency contends that Mr. Humbles is not an interested party because none of the cemetery caretakers' jobs is at stake as a consequence of the decision to contract for the headstone setting services. As noted above, the agency has represented that "no unit employee will be displaced, reassigned, subject to reduction in force, or otherwise adversely affected by the management's decision to contract out [headstone setting services]." Protest, Attach. B.

Pursuant to the bid protest provisions of the Competition in Contracting Act of 1984, (CICA), 31 U.S.C. §§ 3551-3556 (2006), and as implemented in our Bid Protest Regulations, only an "interested party" may protest a federal procurement to our Office. Regarding "a decision to convert a function performed by Federal employees to private sector performance without a public-private competition under [Office of Management and Budget (OMB)] Circular A-76,"² 31 U.S.C. § 3551(2)(B), the term "interested party" includes "[a]ny one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees." 4 C.F.R. § 21.0(a)(2)(B) (2009).

Mr. Humbles maintains that he qualifies as an interested party since he has been designated by a majority of the federal employees who are presently performing the headstone setting function to represent them in this protest and because he is challenging the agency's decision to convert the headstone setting function to contractor performance without a public-private competition.

We conclude that Mr. Humbles does not come within the definition of interested party because his challenge does not concern a "decision to convert a function

(...continued)

(A) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function;

* * * * *

This section was subsequently amended by Division D of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 735, 123 Stat. 524, 689 (2009), which removed the limitation on the applicability of the provision to activities or functions performed by more than 10 federal employees.

² OMB Circular A-76 is the executive branch policy guidance which provides the framework for public-private competitions.

performed by Federal employees to private sector performance” without a public-private competition within the meaning of CICA, 31 U.S.C. § 3551(2)(B), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a)(2)(B). The record here shows that while the array of day-to-day tasks performed by the Fort Logan cemetery caretakers will change to some degree as a consequence of the agency’s decision to use a contractor to perform headstone setting work, the federal employees will remain as cemetery caretakers and continue to perform other aspects of cemetery operations, all within the ambit of their job descriptions. The Fort Logan Cemetery Director states, the decision to contract for the headstone setting services is intended to “free [the existing] staff to perform other critical tasks that will enable the cemetery to meet or exceed” the standards relating to achieving National Shrine Status. Protest, Attach. B.

As we explained in Mark Whetstone--Designated Employee Agent, supra, federal employees’ jobs must be at stake in order for their designated employee agent to qualify as an interested party to challenge an agency’s conversion of a function to performance by the private sector. Given that no caretakers’ jobs are at stake as a result of the agency’s decision here to acquire the services via contract with a private sector firm--in fact, they will remain available to perform headstone setting as needed--that decision does not involve a conversion to private sector performance. While we recognize 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 of a function, and thereby invoke our interested party provision, that has not occurred under the circumstances in this case.

The protest is dismissed.

Daniel I. Gordon
Acting General Counsel