



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Asiel Enterprises, Inc.

File: B-406780; B-406836

Date: August 28, 2012

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
W. Michael Rose, Esq., Department of the Air Force, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging Air Force's use of a Nonappropriated Fund Instrumentality (NAFI) to provide mission essential food services is sustained where the Air Force transferred the mission essential food service requirements to the NAFI on a noncompetitive basis and failed to otherwise justify the NAFI's provision of this requirement on a sole-source basis; 10 U.S.C. § 2492 (2006) does not provide authority for the Air Force to transfer the provision of mission essential food service requirements to a NAFI.

DECISION

Asiel Enterprises, Inc., of Corpus Christi, Texas, protests the decision by the Department of the Air Force to acquire essential messing services at Barksdale Air Force Base (AFB), in Louisiana, and at Dyess AFB, in Texas, from the Air Force Mission Essential Feeding Fund (AFMEFF), an Air Force Supplemental Mission Nonappropriated Fund Instrumentality (NAFI), on a sole-source basis, rather than holding a competition.

We sustain the protest.

BACKGROUND

This protest concerns the Air Force's Food Transformation Initiative (FTI), a program designed to fundamentally change the way in which the Air Force obtains "mission essential food services" and operates non-mission essential food services provided within the Morale, Welfare, and Recreation (MWR) system. Until the

adoption of the FTI program, mission essential food services and non-mission essential MWR food services have been handled separately within the Air Force.

In this regard, Air Force installations have either performed in-house, or directly contracted for, mission essential food services--e.g., food services provided at Air Force dining facilities to airmen. When contracting for these services, the Air Force uses appropriated funds, and is required to award the contracts pursuant to applicable procurement laws and regulations, to include, among others, the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR). Asiel is one such contractor, providing mission essential food services to the Air Force at Barksdale AFB and Dyess AFB.

Non-mission essential food service activities, on the other hand, pertain to food services within the MWR system. Food services provided within this system are operated by MWR NAFIs¹ established by the Air Force, and constitute what DoD defines as “Category C-Revenue Generating” MWR programs. More specifically, these programs include “restaurants, snack bars, and limited menu operations as well as beverage, social catering, take-out food and non-alcoholic beverages, other Service-themed food operations and entertainment programs;” an example would be an officer’s club located on a military installation. DoD Instruction 1015.10, Military Moral, Welfare, and Recreation (MWR) Programs, encl. 5, ¶ 3.a(2). Activities under this category are considered to have the business capability of generating enough income to cover most of their operating expenses and are to receive only limited support from appropriated funds. Id. at ¶ 3.

Under the FTI program, the Air Force has essentially combined the mission essential food services and the food services provided within the MWR system, and transferred them to a NAFI specifically created to administer the program, the Air Force Mission Essential Feeding Fund (AFMEFF),² through a memorandum of agreement (MOA). Under FTI, appropriated funds are transferred from Air Force

¹ The Department of Defense (DoD) defines a NAFI as a “DoD organizational and fiscal entity that is supported in whole or in part by [nonappropriated funds]. It acts in its own name to provide or assist the Secretaries of the Military Departments in providing programs for [DoD] personnel.” DoD Instruction 1015.15, Procedures for Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, encl. 2, ¶ E.2.13 (Oct. 31, 2007). The DoD instruction also expressly provides that NAFIs are established for defined MWR programs. Id. at ¶ 4.2.

² The Air Force indicates that the AFMEFF was established to provide “program management and oversight, financial management and audit of operations, policy guidance, IT management systems, and centralized contracting for FTI.” Agency Report (AR) at 5.

installations ultimately to the NAFI, which provides the installations' mission essential services using "pre-qualified" contractors.³ However, unlike the direct contracting method historically used by the Air Force to obtain its mission essential food services, under FTI, the Air Force does not, at any point in the process, follow procurement laws and regulations, such as CICA and FAR.

More specifically, according to the Air Force, in August 2009, the Air Force Nonappropriated Fund Purchasing Office (AFNAFPO), within the Air Force Services Agency (AFSVA), posted a notice on its website, explaining that an Air Force NAFI, was piloting a new food transformation concept to improve the delivery of Air Force food services, and that the NAFI would "execute a strategic plan for portfolios of food and beverage activities at multiple selected Air Force bases and related facilities throughout the world." AR, Tab 19. The notice advised that the NAFI's objective was to pre-qualify strategic sources for the [FTI] to offer business opportunities to selected contractors awarded Nonappropriated [Fund] Purchasing Agreements (NPAs) to assist the NAFI in executing its strategic plan." Id. The notice further advised that the work to be performed by the contractor would include the provision of food and beverage services, facilities management, maintenance/repair services, and other related services. The notice instructed interested sources to respond to a Qualifications Survey, which sought information regarding the source's current and past performance/experience (noting that the NAFI was "looking to partner with a firm that has demonstrated experience in the operation and management of diversely located food and beverage outlets"), corporate/operating structure, and financial strength and capabilities. Id. The Air Force explains that the pre-qualification process has remained open continuously since August 2009, and that to date, three sources (Aramark, Sodexo, and Compass) have pre-qualified.

As a consequence of the pre-qualification selection process, the AFNAFPO entered into NPAs with Aramark and Sodexo on May 25, 2010.⁴ These NPAs contemplate the issuance of delivery orders to provide food services on Air Force bases necessary for the accomplishment of the FTI "at a level of quality acceptable to the [Air Force NAFI]." AR, Tabs 27 and 31, Aramark and Sodexo NPAs, at 3. The NPAs specifically envision a nonappropriated fund (NAF) "contractor-operated approach which combines NAF and [appropriated fund] resources to provide

³ The Air Force describes the arrangement between the NAFI and the pre-qualified contractors as nonappropriated fund contracts, and states that they are not subject to the FAR. AR at 2.

⁴ We were not advised as to whether the AFNAFPO has also entered into an NPA with Compass.

mission and NAF resale feeding capabilities in NAF food operations in military dining and club facilities, and possibly throughout the installation.”⁵ Id.

Thereafter, the AFNAFPO issued a request for quotations (RFQ) to the pre-qualified contractors for the first portfolio of bases, which included food and beverage activities at Elmendorf, Travis, Fairchild, Little Rock, MacDill, and Patrick AFBs, on April 26, 2010. On August 31, 2010, the AFNAFPO, apparently on behalf of the AFMEFF, issued a delivery order for the first portfolio of six bases to Aramark.⁶

On November 18, 2010, the AFMEFF and the AFSVA entered into their MOA. As explained by the Air Force, “AFSVA entered into a NAFI MOA with the [AFMEFF], a NAFI, to provide appropriated funds in exchange for the operation of mission essential dining services.” AR at 4. The opening paragraph of the MOA reads as follows:

The purpose of this [NAFI/MOA] is to provide funding for the Air Force transformation and operation of Appropriated Fund (APF) feeding capabilities using an enterprise approach to create venues similar to those found on leading corporate, college, and university campuses. AFSVA will provide funding for the AFMEFF as part of the [FTI] at installations as outlined in the individual Installation Operating Agreements (IOA) (attachments 1-3). [AFNAFPO] will issue delivery orders under the [NPA entered into with Aramark] for the operation of the mission essential feeding facilities (MEFF) at the six installations. Work will be performed in accordance with the corresponding Statement of Work (SOW) (attachment 4), and Statement of Objectives (SOO) (attachment 5). In addition to operational costs, the funding provided will be used for personnel, travel, overhead, and administrative costs associated with the program.

AR, Tab 9, MOA, at 1. The MOA indicated that the agreement would cover the first portfolio of bases under FTI but noted that “additional bases may be added by

⁵ Both agreements provide that the “contracting” NAFI for each delivery order issued thereunder will be identified on the particular delivery order. AR, Tabs 27 and 31, Aramark and Sodexo NPAs, at 2.

⁶ While the delivery order refers to “the NAFI” in multiple places, we were unable to find any information identifying the particular NAFI in question. That is, contrary to the guidance furnished in Aramark’s NPA, as indicated in note 5, supra, the contracting NAFI was not identified with any specificity on the delivery order. However, given that the Air Force established the AFMEFF to administer the FTI program, which includes providing “centralized contracting for FTI,” we understand “the NAFI” to be the AFMEFF. AR, at 5. Moreover, the Air Force’s pleadings specifically refer to the AFMEFF as “the NAFI.” Id.

amendment.” Id. The MOA further provided that AFSVA would transfer \$11,050,853 to the fund immediately, and that charges for the services provided by the AFMEFF would be computed at 1.5 percent of the transfer amount. Id. at 2. The funds transferred by AFSVA to the AFMEFF are appropriated funds, received from the installations covered by the MOA under the individual IOAs. See, AR, Tab 30, IOAs. Over the course of the next year and a half, the MOA was amended a number of times to transfer additional funds to the AFMEFF. Subsequently, the AFSVA entered into IOAs with a second portfolio of bases, including Barksdale AFB and Dyess AFB, to be covered under the MOA, as well.⁷

On February 13, 2012, the AFNAFPO issued to the pre-qualified sources an RFQ pertaining to the second portfolio of bases. The RFQ sought quotations for “the operations of a portfolio of [MEFF], construction and renovation of multiple MEFF facilities, and multiple NAF Food and Beverage concessionaire contracts for various NAF Food and Beverage Operations within the portfolio.” AR, Tab 23, FTI Portfolio 1b RFQ, at 2.

The protester, the incumbent provider of mission essential food services at both Barksdale AFB and Dyess AFB, received a letter from Aramark on April 17, 2012, which stated that Aramark was responding to an RFQ from the AFSVA to perform food support services at Barksdale AFB. Aramark requested the protester’s support in the preparation of its offer and represented that if Aramark were successful in winning the contract, it would, “based [upon] its determinations and discretion,” award Asiel a subcontract. Protest, Tab 1, Letter from Aramark to Asiel, Apr. 17, 2012, at 1. According to the protester, it contacted contracting officials at both Barksdale AFB and Dyess AFB for further information, since it was unaware of any RFQ, but received nothing responsive to its inquiry. According to the protester, it also requested a copy of the RFQ from the base contracting offices (which could not provide it); from Aramark (which refused to provide it); and from the AFSVA (which did not respond to the request). The protester also filed a Freedom of Information Act request, but had not yet received a reply at the time of its protest. Having received no response from the Air Force, Asiel protested to our Office on May 21.⁸

⁷ The date March 28, 2012 appears at the bottom of all of the pages of the IOA between the AFSVA and Dyess AFB, and the date May 11, 2012 appears at the bottom of all of the pages of the IOA between the AFSVA and Barksdale AFB, with the exception of the final page (which is the page bearing the parties’ signatures); that page bears the date April 12, 2012. It is not clear whether these are the dates on which the IOAs were signed. Also, subsequent to the signing of the IOAs in question, the AFSVA was inactivated and consolidated with the Air Force Personnel Center, and the IOAs were updated to reflect the change.

⁸ The Air Force argued that the protest was untimely because the protester was on notice of its basis for protest as a consequence of a GAO report, DEFENSE
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While no order had been issued pursuant to the second RFQ at the time the Air Force submitted its agency report on this protest, the AFNAFPO, apparently on behalf of the AFMEFF, subsequently issued a delivery order to Sodexo for Barksdale AFB and Dyess AFB on July 26.

DISCUSSION

The protester argues that when the Air Force transferred the operation of mission essential food services at Barksdale AFB and Dyess AFB to the AFMEFF, it was required to do so through a competitive procurement process under CICA, and, having failed to obtain competition, the Air Force's transfer of this requirement to the NAFI essentially constituted an improper sole-source award in violation of CICA.⁹ The Air Force maintains that it has special authority under 10 U.S.C. § 2492 (2006) to obtain the services in question from the AFMEFF through a MOA, and that, as a consequence, CICA was inapplicable. As explained below, we conclude that section 2492 does not provide authority for the Air Force to transfer the provision of mission essential food services to a NAFI. By its terms, section 2492 limits such agreements to those in support of morale, welfare, and recreation (MWR). Because mission essential food services--supported entirely with appropriated funds--are not within the MWR system, the transfer of such requirements to AFMEFF without obtaining competition, or justifying an award to the NAFI on a sole-source basis, was in contravention of CICA and FAR.

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MANAGEMENT: Actions Needed to Improve Management of Air Force's Food Transformation Initiative, GAO-11-676, July 26, 2011, addressing the Air Force's Food Transformation Initiative. Essentially, the Air Force would hold the protester to constructive notice of the information contained in the GAO report. We decline to hold the protester to constructive notice of information contained in a GAO report where the information is not otherwise available through some official medium designated by statute or regulation. See WorldWide Language Resources, Inc.; SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 at 9 (holding that protester was not on constructive notice of contract information published on a Department of Defense website since the website was not designated by statute or regulation as an official medium for the dissemination of such information).

⁹ While we generally do not review protests of the award of agreements other than procurement contracts pursuant to our bid protest jurisdiction under CICA, 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R. § 21.1(a) (2012), we will review a timely protest that an agency is improperly using a non-procurement instrument, such as the MOA here, where a procurement contract is required, to ensure that the agency is not attempting to avoid the requirements of procurement statutes and regulations. Assisted Housing Servs. Corp. et al., B-406738 et al., Aug. 15, 2012, 2012 CPD ¶ ___; Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3.

The statutory provision upon which the Air Force relies, 10 U.S.C. § 2492, provides as follows:

An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system.

As an initial matter, we note that Air Force does not appear to take the position that the mission essential food services, which are at issue in this case, fall within the ambit of the MWR system.¹⁰ We specifically asked the Air Force to address this point and, instead, it provided a rather lengthy discussion of how the FTI program operates, and the advantages and efficiencies to be achieved through the consolidation of these programs. We take the Air Force's non-answer in this regard to be an implicit recognition that such requirements do not fall within the MWR system. In any event, to the extent the Air Force's own characterization of the requirements as "mission essential" does not settle the point, the conclusion that these services do not fall within the MWR system is inescapable, where they are paid for entirely with appropriated funds, there is no indication that they have ever previously been considered to fall within the MWR system, and they do not fit within any reasonable understanding of the DoD's definition of Class C MWR food services activities.¹¹

Since mission essential food services do not fall within the MWR system, it appears that the Air Force has taken the position that section 2492 gives it the authority to consolidate management and accounting for its mission essential and non-mission essential MWR food serving operations so long as consolidation will benefit the efficient management and operation of its MWR food operations. See Agency Response to GAO Questions, July 18, 2012, at 2. Thus, the agency's argument, as

¹⁰ This protest does not concern the operation of the exchange system established under 10 U.S.C. § 2481 et seq.

¹¹ Consistent with our finding in this regard, the record indicates that staff members within the DoD advised the Air Force that mission essential food services, e.g., "military dining facilities," operate outside of the MWR system, and that the Air Force is prohibited from using a NAFI MOA to operate such an activity. See AR, Tab 7, Assistant Secretary of the Air Force (M&RA) Memo Re: Request for Waiver to Secretary of Defense Policy, Jan. 8, 2010, at 1.

we understand it, is that section 2492 authorizes the AFMEF, a NAFI, to provide mission essential feeding services to the Air Force because it is of benefit to the MWR system for the Air Force to acquire both operation of essential food service facilities and operation of non-essential food services facilities (such as officers' clubs) from the same contractor.

We do not find this to be a reasonable reading of the statute.¹² While section 2492 authorizes a NAFI such as the AFMEFF to enter into an agreement with the Air Force to provide services beneficial to the efficient management and operation of the MWR system, there is nothing to suggest that it authorizes an agreement between the NAFI and the Air Force for the provision of mission essential services on the theory that consolidating such activities under the MWR system may provide a benefit the MWR system. Such an application would constitute a radical departure from the general understanding that DoD NAFIs are established to engage in MWR related activities. See DoD Instruction 1015.15, supra (stating that "NAFIs shall be established for military morale, welfare, and recreation (MWR) programs"). We also find the Air Force's interpretation particularly strained in this instance where, by all reasonable measures, the value of the mission essential services to be provided by the NAFI under its agreement with the Air Force substantially exceeds the value of any non-mission essential food (i.e., MWR-related) services, which are the traditional bailiwick of NAFIs and to which section 2492 is expressly directed. See, e.g., AR, Tab 26, RFQ F41999-10-Q-0495, Portfolio I, FTI Schedule of Services (reflecting that historical usage associated with mission essential food services at airbases has been much greater than MWR, NAFI operated food activities).

Without authority under section 2492, the only way that the Air Force could have properly transferred appropriated funds to the NAFI for the provision of mission essential food services would have been through a competitive procurement process. In this regard, although NAFIs are considered to be instrumentalities of the United States government, obtaining services from a NAFI is "tantamount to obtaining services from nongovernment commercial sources"; therefore, NAFIs are required to compete to provide goods or services to agencies through the usual procurement process mandated by CICA, and implemented in the FAR. See University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636 at 5-6.

Thus, before restricting competition for the mission essential food services to a single source (i.e., the AFMEFF), the Air Force was required to comply with statutory requirements pertaining to competition, including preparing a Justification & Approval (J&A) for the use of other than competitive procedures and publishing notice of its intention to use other than competitive procedures on the FedBizOpps

¹² We also note that the Air Force has cited no legislative history supporting this interpretation of the statutory language.

website.¹³ 10 U.S.C. § 2304(f)(1); FAR Subpart 6.3. Because the Air Force failed to comply with these mandates, we sustain Asiel's protest.

RECOMMENDATION

We recommend that the Air Force terminate its agreement with the AFMEFF to the extent it provides for the provision of mission essential food services at Barksdale AFB and Dyess AFB, and that the Air Force award these requirements on a competitive basis or prepare a J&A which reasonably supports using the AFMEFF for this purpose, and which is consistent with the requirements of CICA and the FAR.¹⁴ We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel

¹³ We recognize that the Air Force has argued that 10 U.S.C. § 2304(a)(1), which provides for an exception to the requirement for full and open competition "in the case of procurement procedures otherwise expressly authorized by statute," exempts the procurement here from the requirements of CICA. This argument lacks merit given that, as noted above, 10 U.S.C. § 2492 did not authorize the procedure used by the Air Force here. Moreover, 10 U.S.C. § 2492 does not, in any event, authorize the acquisition of services by the Air Force from a NAFI using other than full and open competition; it merely gives the NAFI the authority to enter into certain types of contracts and agreements with the AF.

¹⁴ Our recommendation is necessarily limited to the Air Force's mission essential food service requirements at Barksdale AFB and Dyess AFB since these are the only two bases challenged by the protester. However, given the nature of the FTI program, the problems identified in this decision apply equally to all Air Base mission essential food service requirements that have been transferred to the AFMEFF under the FTI program, to date. Thus, in our view, the Air Force should consider extending the application of our recommendation to these installations as well.