



Decision

Matter of: Jeff Gose--Designated Employee Agent

File: B-401100

Date: May 13, 2009

Jeff Gose, Designated Employee Agent, the protester.
Dionis M. Gauvin, Esq., Federal Bureau of Prisons, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the decision of the Federal Bureau of Prisons to terminate the agency's inmate vocational dental laboratory training program and obtain the dental laboratory services (being performed by inmates) from private sources is denied where positions of federal employees are not being converted to contractor performance.

DECISION

Jeff Gose-Designated Employee Agent protests the issuance of request for quotations (RFQ) No. NAS-0049-09 by the Federal Bureau of Prisons (BOP), Department of Justice, for dental laboratory services for prison inmates. Mr. Gose contends that the services sought by the RFQ are an unlawful direct conversion of a function or activity performed by federal employees.

We deny the protest.

BOP provides health care and dental care to prison inmates within the United States and Puerto Rico. RFQ, Statement of Work, at 1. As part of these dental care services, BOP provides inmates with dental prosthetics such as dentures, crowns, bridges, and night guards. Protest at 2. One supply source for these dental prosthetics has been the agency's vocational training dental laboratory program.¹ Supplemental (Supp.) Agency Report (AR), Declaration of BOP Chief Dentist, at 1.

¹ BOP provides a variety of training programs for inmates to acquire literacy and vocational skills. See www.bop.gov_programs/edu.jsp.

Under this vocational training program, prison inmates produce dental prosthetics in one of BOP's five regional dental laboratories. The training and supervision of the inmates in this program are the responsibility of federal employees, such as Mr. Gose, who hold the position of vocational training instructor. See Protester's Comments, exh. 3, Vocational Training Instructor Position Description, at 1.

As a result of a study, BOP determined in 2008 that the vocational training dental laboratory program was not efficient or cost effective and decided to terminate the program, close the regional laboratories, and obtain the dental laboratory services from private sources. BOP informed Mr. Gose and other vocational dental laboratory trainers that the regional dental laboratories would be closed and that the dental laboratory trainers would be transferred to other vocational training positions within the agency. This protest followed.

Mr. Gose argues that the agency's actions constitute a direct conversion of his and the other vocational dental laboratory trainers' positions to private performance in violation of law. Specifically, Mr. Gose contends that Division D of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 739(a), 121 Stat. 1844, 2029-31 (2008), prohibits the direct conversion of "an activity or function" performed by the vocational technical instructors here.² Mr. Gose states that the vocational trainers perform numerous activities (such as quality control, prosthetic adjustments, and supervision of "all aspects of production") that will be performed by a contractor. Protester's Comments at 2-3. In this regard, Mr. Gose notes that the primary function of the dental laboratories is to provide dental prosthetics and that the secondary function is to train inmates. See Protester's Supplemental Comments, Declaration of South Central Regional Dental Laboratory Vocational Instructor, at 1.

² 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--

(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 of the applicability of the provision to activities or functions performed by more than 10 federal employees.

The agency responds that it is not converting an activity or function performed by federal employees to private sector performance. Rather, the agency contends that it has decided to discontinue an inmate dental laboratory program, under which inmates were trained to produce and produced dental prosthetics; the agency contends that it is the functions or activities performed by inmates that are being converted to private sector performance. AR at 1. The agency asserts that the function or activity performed by the vocational training instructors is the training and supervision of inmates in the performance of dental laboratory services. In this regard, the agency notes that the vocational training instructors were hired and perform their duties under the Office of Personnel Management's general schedule (GS)-1712 position description for training instruction, and were not hired to be dental laboratory aides or technicians, which would have been covered by the GS-0638 classification. See Supp. AR at 2-3; see also Supp. AR, Declaration of BOP Chief Dentist, at 2. BOP also states that Mr. Gose and the other dental laboratory vocational training instructors will not be affected by discontinuing the dental laboratory training program because they will remain at their current institutions, assigned to other vocational training positions consistent with their GS-1712 position description, and will retain their same pay grades. Agency Dismissal Request at 2.

We agree with BOP that the function or activity that would be converted to contractor performance is that performed by the BOP inmates and not that performed by Mr. Gose and the other vocational training instructors.³ Fundamentally, the RFQ seeks a vendor that would provide the services performed by the inmates, whereas the vocational training instructors are intended to support the inmates' performance of these services. Even if a public-private competition were required for the dental laboratory services, the vocational training instructors would (if they competed) not be proposing to do their current jobs, but rather to take over the tasks now performed by BOP's inmates. Therefore, we conclude that, although the agency's decision to discontinue the dental laboratory program indirectly affects the vocational training instructors' positions, this does not establish that the agency's actions constitute a conversion of these positions within

³ The protester argues that BOP's study, under which BOP decided that the vocational training dental laboratory program was not efficient or cost effective, considered the vocational training instructors' salaries and that this demonstrates that the trainers' work is a vital function in the operation of the dental lab. This argument, however, does not demonstrate that the function or activity being converted to contractor performance is the work performed by the the vocational training instructors. BOP's cost effectiveness study merely reflected all of the costs entailed in the dental laboratory program, which necessarily included the costs of training and supervising the inmates.

the meaning of § 739(a) of the Consolidated Appropriations Act. Accordingly, the function or activity being converted to contractor performance is not that performed by the vocational training instructors, and thus we deny Mr. Gose's protest.

Daniel I. Gordon
Acting General Counsel