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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: B.R. Hardison--Designated Employee Agent

File: B-311275

Date: May 29, 2008

B.R. Hardison, Designated Employee Agent, the protester.
Tammy L. Kennedy, Esq., Department of Veterans Affairs, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed by Designated Employee Agent challenging agency's decision to contract for pharmacy services with the private sector without conducting a public-private competition under Office of Management and Budget (OMB) Circular A-76 is dismissed, where no federal employee jobs are affected and, thus, Designated Employee Agent is not an interested party to protest the agency's action.
 2. Public-private competition under OMB Circular A-76 is not required where the activity or function at issue involves fewer than 10 federal employees.
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DECISION

B.R. Hardison--Designated Employee Agent,¹ President of the American Federation of Government Employees (AFGE) Local 2400, protests the alleged "direct conversion" by the Department of Veterans Affairs (VA) of pharmacy services performed by VA pharmacy staff at the Tennessee Community-Based Outpatient

¹ As discussed more fully below, recently enacted changes to our bid protest statute grant interested party status to any one individual who has been designated as the agent of federal employees for purposes of representing them in a public-private competition, or for purposes of arguing that a public-private competition is required under the circumstances presented. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3, 62-63 (2008). Hence, we have adopted the term "designated employee agent" to refer to both the protester and the person selected to represent federal employees in these challenges.

Clinic (TCBOC)² to the private sector without conducting a public-private competition under Office of Management and Budget (OMB) Circular A-76.

We dismiss the protest.

The TCBOC is composed of four personnel (two pharmacists and two technicians) who provide outpatient pharmacy services for VA members by “window-filling” prescriptions. In mid-2006, the wait time for receiving prescriptions began to rise and, as of November 2007, the wait time was “over 45 minutes.” At the same time, patient satisfaction with the pharmacy services decreased.³ Declaration of Tennessee Valley Healthcare System Chief of Pharmacy ¶ 2.

In order to reduce wait times and increase patient satisfaction, the VA decided to decrease the “window-fill” workload by using “mail-out” procedures to fill controlled substance prescriptions. Since TCBOC was solely a “window-fill” operation and had never performed “mail-out” services, the VA decided to use an existing “Veteran Integrated Service Network (VISN) 9” contract with Medical Matrix, LLP, to fill acute/urgent prescriptions by mail, and an existing VA “Consolidated Mail Out Program” to fill the remaining controlled substance prescriptions by mail. *Id.* ¶ 3. The four TCBOC employees would remain in their current positions with “no change in job descriptions, grade or performance standards,” and the TCBOC budget would remain unchanged. *Id.* ¶ 5; Agency Reply to Protester’s Comments (Apr. 18, 2008) at 2.

Mr. Hardison contends that the agency’s decision to remove the above workload from the TCBOC requires the agency to conduct a public-private competition. We find that Mr. Hardison is not an interested party eligible to challenge this decision.

With regard to A-76 contests, section 326 of the National Defense Authorization Act for Fiscal Year 2008, amended the definition of interested party applicable to our bid protest function as set forth in 31 U.S.C. § 3551(2), as follows:

² The TCBOC is an affiliate of the VA’s Tennessee Valley Health Care System.

³ According to the agency, the national VA handbook requires prescription wait times to be less than 30 minutes. Declaration of Tennessee Valley Healthcare System Chief of Pharmacy ¶ 2.

(2) The term “interested party”--

* * * *

(B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 with respect to the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, includes--

* * * *

(ii) any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest under this subchapter that relates to such public-private competition, has been designated as the agent of the Federal employees by a majority of such employees.

31 U.S.C. § 3551(2). Mr. Hardison is not an interested party under this statutory provision to protest the agency’s decision to “convert” a function performed by federal employees to private sector performance without competition, because no federal employee jobs are at risk and therefore there is no prejudice, which is an essential element of every protest. See Mark Whetsone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ __ at 5-6. As stated above, the TCBOC has only four employees and none of these employees’ jobs have been eliminated or changed in any way, and the record reflects that the agency is merely seeking to use a contractor to perform tasks, not currently performed by TCBOC, relating to the dispensing of drugs.

Moreover, even if Mr. Hardison were an interested party to protest the agency’s failure to conduct a public-private competition, on the facts here, no such competition was required. In this regard, the Office of Federal Procurement Policy Act, 41 U.S.C. § 403 et seq., as amended by the National Defense Authorization Act for Fiscal Year 2008, requires a public-private competition prior to converting public sector jobs to contractor performance whenever the conversion involves “a function of an executive agency performed by 10 or more agency civilian employees.”⁴

⁴ In these cases, the statute requires agencies to conduct a public-private competition that, among other things:

(A) formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;

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National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 327, 122 Stat. 3 (2008). Similarly, Division D of the Consolidated Appropriations Act of Fiscal Year 2008, Pub. L. No. 110-161, § 739(a), 121 Stat. 1844 (2007), provides, in relevant part:

(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;

These laws make clear that a public-private competition is required when 10 or more federal employees perform the “activity or function” that is being converted to private sector performance. These laws do not require a public-private competition when fewer than 10 federal employees perform the “activity or function” at issue. Lisa Hartman--Designated Employee Agent, B-311247, May 6, 2008, 2008 CPD ¶ __ at 4.

As noted above, the TCBOC has only four federal employees; thus, only four employees perform the function that allegedly has been converted to private sector performance. Although the protester argues that the “activity or function” in question actually consists of the totality of the full time equivalent (FTE) employees performing VA pharmacy services that are listed in the VA’s FAIR Act inventory⁵ (260 FTEs in Tennessee and 8,900 FTEs nationwide), we do not regard this as a reasonable meaning of “activity or function” for purposes of the statutes requiring a public-private competition. Rather, we think that a reasonable reading of those statutes, under the circumstances presented here, would be that the “activity or function” protested is limited to the work performed by the TCBOC, which consists

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(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;

(C) includes the issuance of a solicitation . . .

National Defense Authorization Act for Fiscal Year 2008, supra.

⁵ The “FAIR Act” refers to the Federal Activities Reform Act of 1998, 31 U.S.C. § 501 note (1998).

of only four federal employees. Thus, we believe that a public-private competition would not be required here, even if any of the federal employees' jobs were at risk.

We dismiss the protest.

Gary L. Kepplinger
General Counsel