

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contests of)	
)	
Agency Tender Official)	Docket No. 05-ODRA-00342C
James H. Washington and)	Docket No. 05-ODRA-00343C
Kate Breen, Agent for a Majority of)	
Directly Affected FAA Employees)	
<u>Pursuant to Solicitation DTFAAWAACA-76-001)</u>)	

**ORDER ON REQUEST FOR
INTERVENTION AS INTERESTED PARTY**

BACKGROUND

On March 14, 2005, Ms. Kate Breen, through counsel requested that the Office of Dispute Resolution for Acquisition (“ODRA”) allow her to intervene in the Contest brought by the Agency Tender Official (“ATO Contest”). Ms. Breen is the President of the National Association of Air Traffic Specialists (“NAATS”), and seeks intervention (“Breen Request”) on the basis that she is the appointed agent for a majority of directly affected Federal Aviation Administration (“FAA”) employees. On March 16, 2005, Lockheed Martin Services, Inc. (“LMSI”) filed its objection to her intervention (“LMSI Objection”). Ms. Breen filed a Reply (“Breen Reply”) on March 18, 2005. On March 22, LMSI filed a Supplementary Reply (“Supplementary Reply”). For the reasons set forth below, the ODRA grants the intervention request.

The instant procurement is for Automated Flight Service Station services and was conducted as a private-public competition under the FAA’s adaptation of Office of Management and Budget Circular No. A-76 (“Circular A-76”). On February 1, 2005, the FAA Competitive Sourcing Program Office (“Program Office”) announced that it had selected LMSI to be the service provider. The Program Office conducted separate post-award debriefings for all offerors, as well as for Ms. Breen. By letter dated March 11, the

ATO filed its Contest against the performance decision. On March 16, 2005, Ms. Breen filed a Contest (“Breen Contest”), which was docketed as 05-ODRA-343C and which the ODRA has consolidated with the ATO Contest.

In her Request to intervene in the ATO Contest, Ms. Breen states that she is a directly interested party under ODRA’s Contest Rules because she was appointed to be the contest agent by a majority of directly affected federal employees. In this regard, the record reflects that on November 30, 2004, Ms. Breen was elected President of the NAATS based upon a nationwide election of NAATS members. *See Breen Request for Intervention, Exhibit 3.* On that same date, the NAATS Board appointed Ms. Breen to serve as the “agent for any competition (and any related proceedings) for the directly affected employees of the collective bargaining unit (CBU) of the FAA employees in the Flight Service option.” *See Breen Request for Intervention at 2.* The Board also nominated Ms. Breen to represent all directly affected employees who were not part of the CBU. According to Ms. Breen, she currently represents at least 1,806 out of a reported 2,262 FAA employees who are directly affected by this competition.¹ *See Breen Reply to LMSI Objection at 3.*

Notwithstanding these representations, LMSI contends that Ms. Breen should not be permitted to intervene. First, LMSI argues that, as a union representative, Ms. Breen is not authorized to represent employees in A-76 Contests because such representation is beyond the jurisdiction of NAATS. *See LMSI Objection at 3.* LMSI also maintains that because affected employees have not taken affirmative steps to authorize her, Ms. Breen is not a duly appointed Agent. *See LMSI Objection at 2.* For the reasons discussed below, the ODRA finds that Ms. Breen has demonstrated that she is the appointed agent for a majority of FAA employees directly affected by this competition, within the meaning of the ODRA Contest Rules. The ODRA further concludes that because: (1) Ms. Breen has filed her own Contest of the Performance Decision; and (2) the Breen Contest has been consolidated with the ATO Contest

¹ According to Ms. Breen, approximately 80% of the directly affected FAA employees are members of NAATS. *See Breen Request at 2.*

(“Consolidated Contests”), the intervention of Ms. Breen in the ATO Contest will not interfere with the prompt resolution of the Consolidated Contests.

DISCUSSION

The general Delegations of authority from the FAA Administrator vest the ODRA with broad discretion to manage dispute resolution proceedings. Under the ODRA Contest Rules, an intervenor is defined as “an interested party other than the Contester whose participation in a Contest is *allowed by ODRA*.” See CR 2(g) (emphasis added). The ODRA Rules also provide that in the context of a Contest, a “directly interested” party *can* be “a single individual appointed by a majority of directly affected FAA employees as their agent” and that “a directly interested party *may participate as an intervenor* in a Contest that has been initiated by another directly interested party.” See CR 2(g) (emphasis added.)

Circular A-76 places a premium on ensuring fair treatment for all potential service providers, including federal employees and their representatives. In 2001, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001² directed the Comptroller General of the United States to convene a Commercial Activities Panel (“Panel”) to study the 1996 version of Circular A-76 and the rules governing the possible transfer of commercial activities from federal government personnel to private contractors. Between May 2001 and March 2002, the Panel conducted three public hearings and eleven “meetings.”³ Of significance to this discussion, the Comptroller General of the United States—who chaired the Panel—later explained that during its work, “the Panel heard from a variety of witnesses about the pros and cons of the [1996] A-76 process” as well as a “lack of trust in the process. . . among federal employees” and the private sector.⁴ The Comptroller reported that “many federal employees and unions felt that they were being viewed as if they were part of the problem [with public-private

² See Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221-22 (2001), available at <http://www.gao.gov/a76panel/sec832.htm>.

³ See *Commercial Activities Panel Final Report: Improving the Sourcing Decisions of the Government*, at 3, April 10, 2002 [hereinafter “*Panel Report*”], available at <http://www.gao.gov/a76panel/dcap0201.pdf>.

⁴ See David M. Walker, *The Future of Competitive Sourcing*, 33 Pub. Cont. L.J. 329, 302 (2004).

sourcing], rather than part of the solution” and that these federal employees had “raised concerns about conflicts of interest and the need for a more level playing field.”⁵

On April 30, 2002, the Panel issued its Final Report, “Improving the Sourcing Decisions of the Government,” which contained ten “Sourcing Principles” for public-private competitions, along with several implementing recommendations.⁶ The Report emphasized particular concern for fairness to federal employees. For example, the Panel reported that:

[g]overnment workers have been concerned about the impact of competition on their jobs, the opportunity for input into the process, and *the lack of parity with industry offerors to protest A-76 competitions.*⁷

The Panel also recognized the need for federal employees “to know and believe that they will be viewed and treated as valuable assets.”⁸ Regarding challenges of public-private competitions or sourcing decisions, the Panel advised that “a clear, transparent, and consistently applied” process is key to “creating trust in the process on the part of those who it most affects” including “federal managers” and “federal employees.”⁹ Finally, the Panel recommended adopting an “Integrated Competition Process” in which “the same basic rights and responsibilities would apply to both the private and public sectors, including accountability for performance and the right to protest.”¹⁰

The Panel’s Report framed many of the revisions found in the May 2003 edition of Circular A-76 on which the FAA’s A-76 process is based. For example, Circular A-76’s definition of “Directly Interested Party” includes, among others, the ATO as well as “a single individual appointed by a majority of directly affected employees as their agent.”¹¹

On April 19, 2004, the Comptroller General petitioned the Congress to consider permitting unions and federal employees to participate in contests at the GAO where the

⁵ *Id.*

⁶ *See Panel Report at 6 and 11.*

⁷ *See Panel Report at 4.* (Emphasis added.)

⁸ *Id. at 7.*

⁹ *Id. at 8.*

¹⁰ *Id. at 11.*

¹¹ *OMB Circular No. 76 at D-4*, May 29, 2003. Available at: www.whitehouse.gov/omb/circulars/a076

majority is represented by a single individual.¹² The Comptroller asserted that the “asymmetry between the protest rights of private-sector and public-sector participants in A-76 competitions has been widely criticized as unfair” and urged “providing a level playing field in A-76 . . . protest standing . . . to address the widespread lack of trust in the A-76 process.”¹³ In the subsequent Ronald W. Reagan National Authorization Act for Fiscal Year 2005, Congress amended the Competition in Contracting Act (CICA) so that “a person representing a majority” of the incumbent employees “may have the right to intervene in a Contest” at GAO.¹⁴

The ODRA Contest Rules regarding contest intervenors are consistent with Circular A-76 and the interested party rule under consideration at GAO.¹⁵ Specifically, under its Contest Rules, the ODRA may permit an individual, such as Ms. Breen, to intervene. *See Consolidated Contests of ATO James H. Washington and Kate Breen, Agent for the Majority of Directly Affected Employees*, 05-ODRA-00342C and 05-ODRA-00343C, Decision of March 28, 2005, denying intervention request. As noted above, Ms. Breen has been the President of the NAATS Union since November 2004. The NAATS Constitution provides that the Union’s purposes are:

to promote, enhance and improve the dignity and stature of specialists in the Flight Service option . . . to improve the hours, wages and working conditions of NAATS members . . . [and] to *petition* Congress and other governmental agencies and tribunals for the enactment and enforcement of laws and regulations that protect and enhance the welfare of its members . . .

Breen Request for Intervention at 1, quoting from NAATS Constitution.

The record also shows that in addition to being elected President, Ms. Breen was subsequently appointed by the NAATS Board of Directors “to serve as agent for any

¹² See *Dan Duefrene; Kelley Dull; Brenda Neuerbur; Gabrielle Martin*, B-293590.2 *et al.*, April 19, 2004, 2004 CPD ¶ 82.

¹³ See *Attachment to Dan Duefrene et al., B-293590.2 et al.*; Letter from David M. Walker, United States Comptroller General, at 2 (April 19, 2004).

¹⁴ See Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848. The accompanying Conference Report provides that “[a] person representing a majority of employees . . . would have the right to intervene in protest filed by an interested party, including the ATO.” See H.R. Conf. Rep. No. 108-767 at 648 (2004).

¹⁵ See 69 Fed. Reg. 75,878, 75,880 (2004). The GAO has solicited and received comments on its proposed rules.

competition (and related proceedings) for the directly affected employees of the [NAATS] collective bargaining unit”. *Breen Request for Intervention* at 2. She also was nominated by the Board “to serve as agent for all of the directly affected employees, including those who are not part of the CBU.” *Breen Request for Intervention* at 2.

On November 30, 2004, Ms. Breen notified each of the Facility Representatives of her nomination to serve as Contest Agent, and the record indicates that she provided written notice of her objective to each of the affected employees. *Breen Request for Intervention* at 2. The record also shows that Ms. Breen issued an “Urgent Notice To All Flight Service Employees” which was distributed to each employee’s mailbox, and posted on each facility’s bulletin board. *Breen Request for Intervention, Exhibit 3*. The Notice advised the FAA employees that they could “participate in the selection of an agent who would be legally entitled to challenge . . . errors in the A-76 competition.” *Id.* In the Notice, Ms. Breen also advised the employees that they could exercise their “right to object to [her] nomination” by submitting an objection form she had included in the literature. *Id.* Finally, the employees were advised that her nomination would be deemed “approved” if a majority of directly affected employees did not object to her appointment. *Id.* at 2. Only 14 objections were received, and no other individual was nominated for the Contest Agent position.¹⁶

LMSI argues that this selection method “certainly cannot be considered to have been an appointment of Ms. Breen by a directly affected majority” of FAA employees because “simple failure to answer the mail by a large number of employees (as occurred here)” could erroneously result in any individual becoming the employee representative. *LMSI Objection* at 5. As such, LMSI argues that “affirmative action” by each employee is necessary to render an individual the Contest Agent. *LMSI Objection* at 6. LMSI’s suggestions to the contrary notwithstanding, the ODRA Rules do not require a formal election process or specify how an employee representative is to be appointed, but only

¹⁶ Ms. Breen was provided with a formal debriefing immediately after the challenged performance decision was made. Significantly, the Program Office has not joined in the LMSI Objection nor in LMSI’s currently pending Motion to dismiss the Breen Contest for lack of standing.

that he or she be “a single individual appointed by a majority of directly affected FAA employees as their agent.” *CR 2(g)*.

The ODRA finds no authority to support the proposition that an “appointment” within the context of the A-76 Circular or the ODRA Contest Rules requires a formalized process, such as would be required in designating a collective bargaining representative. The ODRA similarly rejects LMSI’s argument that Ms. Breen’s claimed status exceeds authority conferred on her by her election as Union President. Under the circumstances, it would be unreasonable and impractical to require that a formal election be held in order to appoint a representative for the purpose of intervening in or filing a Contest. Given the number and disparate locations of the employees involved and the limited timeframe for the filing of an A-76 Contest, requiring that an entity with a pre-existing representational relationship with the affected employees do more than Ms. Breen and NAATS did in this case, would present an unwarranted obstacle to participation in the A-76 contest process. In sum, based on the record before the ODRA, Ms. Breen’s intervention status reasonably is based on: (1) her election to the position of NAATS President; (2) her appointment by the NAATS Board; and (3) the notice-and-opportunity-to-object process described above.

The fact that Ms. Breen also has filed a Contest challenging the selection decision further supports her Request. Ms. Breen’s Contest has been consolidated with the Contest filed by the ATO and the ODRA concludes her intervention in the ATO Contest will not adversely impact the dispute resolution process. The issue presented here is clearly distinguishable from that presented in Computer Science Corporation’s (“CSC”) request to intervene in the Consolidated Contests. *See Consolidated Contests of ATO James H. Washington and Kate Breen, Agent for the Majority of Directly Affected Employees*, 05-ODRA-00342C and 05-ODRA-00343C, *supra*. Unlike Ms. Breen, CSC did not file its own Contest challenging the Performance Decision and the ODRA concluded that full intervention would have created a complicated shadow contest, while not benefiting the resolution of the Consolidated Contests filed by Ms. Breen and the ATO. *Id.* Ms. Breen, by virtue of her Contest, must be viewed as continuing to be directly interested in the Consolidated Contests. Refusing to permit her to intervene in the ATO Contest would

serve no legitimate purpose and would be counterproductive to the prompt and fair resolution of the Consolidated Contests.

The request for intervention therefore is granted.

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March 30, 2005