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	)	
Kate Breen, Agent for a Majority of	)	Docket No. 05-ODRA-00343C
Directly Affected FAA Employees	)	
Pursuant to Solicitation DTFAAWAACA-76-001)		

DECISION AND ORDER ON MOTION TO DISMISS CONTEST FOR LACK OF STANDING

On March 16, 2005, Ms. Kate Breen ("Ms. Breen"), purporting to act as a single individual representing a majority of directly affected Federal Aviation Administration ("FAA") employees, filed a Contest ("Breen Contest") with the Office of Dispute Resolution for Acquisition ("ODRA"). The Breen Contest challenges the performance decision issued by the Competitive Sourcing Program Office ("Program Office") in a public-private competition for Automated Flight Service Station ("AFSS") services conducted under the FAA's adaptation of OMB Circular A-76 ("Circular A-76"). Lockheed Martin Services, Inc. ("LMSI"), the selected service provider, intervened in the Breen Contest in accordance with the ODRA Contest Rules.

On March 22, 2005, LMSI moved to dismiss the Breen Contest, alleging that Ms. Breen lacked standing. ("LMSI Motion"). Ms. Breen's arguments in opposition to LMSI's Motion and Objection are set forth in filings dated March 18, 2005 and March 28, 2005 (referred to herein, respectively, as "Breen Opposition of March 18" and "Breen Opposition of March 28"). LMSI filed its Reply to the Breen Oppositions on March 30, 2005. ("LMSI Reply"). For the reasons set forth below, the ODRA finds that Ms. Breen has standing to pursue the Breen Contest. The ODRA therefore denies LMSI's Motion to Dismiss.

BACKGROUND

LMSI's Motion does not attempt to argue that Ms. Breen is precluded under any circumstance from bringing a Circular A-76 contest at the ODRA. Rather, the LMSI Motion is grounded on the assertion that Ms. Breen does not qualify as a directly interested party because she "has not been affirmatively appointed" by the affected FAA employees for the purpose of representing them in the Breen Contest. *See LMSI Motion* at 3. According to LMSI, her appointment to the position of agent

for the majority of directly affected FAA employees has not been sufficiently established because it was based on a non-action, *i.e.*, a failure to object to her appointment. *Id.* at 3.

It is undisputed in the record that Ms. Breen is the President of the National Association of Air Traffic Specialists ("NAATS"), and that NAATS is the collective bargaining representative of a majority of the directly affected FAA employees who currently perform the AFSS services. Ms. Breen asserts that she satisfies ODRA Contest Rule 2(g), which provides that, for purposes of filing a Contest, a "directly interested party . . . can be a single individual appointed by a majority of directly affected FAA employees as their agent." *See CR 2(g)* and *Breen Opposition of March 18* at 2. Ms. Breen maintains that she has standing to file a Contest because: (1) she was elected President of the NAATS based upon a nationwide election of NAATS members, which rendered her the appointed agent "by FAA employees acting through a representative organization," *Id.* at 6; (2) the NAATS Board appointed her to serve as the agent for directly affected employees; and (3) the affected employees were notified of, and given an opportunity to object to, her intention to act as their representative for contest purposes. *Id.* at 2-5.

The record reflects that the directly affected FAA employees were advised that Ms. Breen's appointment as agent for purposes of representing them in a Contest would be deemed "approved" if a majority of directly affected employees did not submit notices of their objection to her nomination. *Id.* at 4-5. Ms. Breen also has advised the ODRA that the notices provided to the employees advising them of her nomination to serve as agent included an objection form and that a small number of individuals (16) filed objections. *See Breen Opposition of March 28* at 1.

DISCUSSION

By Delegation dated March 10, 2004, the FAA Administrator specifically authorized the Director of ODRA to adjudicate Circular A-76 Contests on behalf of the Administrator ("Delegation"). The Delegation vests the ODRA with broad discretion to manage dispute resolution proceedings. It expressly includes, among other things, authority:

> b. To conduct contest proceedings and to prepare findings and recommendations for the Administrator or the Administrator's delegee, who will issue final decisions in such contests.
>
> c. To deny motions for dismissal or summary relief which have been submitted to the ODRA by parties to contests….

Consistent with its authority, the ODRA prepared and announced in the Federal Register and published on its website procedural rules for the conduct of contest proceedings ("Contest Rules"). The ODRA Contest Rules permit "the pursuit of a contest by a directly interested party." *See* CR 2(d). The definition of a "directly interested party" under the Contest Rules includes "a single individual appointed by a majority of directly affected FAA employees as their agent." *See* CR 2(g). The Contest Rules also provide 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).

The arguments raised by LMSI in support of its Motion were first presented in these Consolidated Contests when LMSI objected to Ms. Breen's attempt to intervene as a directly interested party in the ATO Contest. As LMSI points out, the

argument made by Ms. Breen to establish her standing to file a contest "relies on the same facts and theories of appointment that she had proffered in support of her intervention in the ATO Contest." *See LMSI Motion* at 1. LMSI further correctly asserts that the directly interested party issue "is the same in both contexts" because Ms. Breen can only have standing to intervene in the ATO Contest, or to file her own Contest, if she is a directly interested party under the ODRA Contest Rules. *Id.*

In the Intervention Decision, the ODRA found that, for purposes of intervention, Ms. Breen is a directly interested party under the ODRA Contest Rules inasmuch as she: (1) was elected President of the NAATS; (2) represented at least 1,806 out of a reported 2,262 FAA employees; (3) was appointed by the NAATS Board to serve as the "agent for any competition (and any related proceedings) for the directly affected employees;" and (4) had taken sufficient actions under the circumstances to be viewed as a representative for that purpose. *See Intervention Decision* at 5-7. Although LMSI argued in opposing the intervention, as it does now, that "affirmative action" by each employee was required to prove Ms. Breen's "appointed agent" status, *see LMSI Motion* at 2-5, the ODRA interpreted the Contest Rules as not requiring a formal election process or specifying how an employee representative is to be designated. *See Intervention Decision* at 7-8. In this regard, the ODRA stated that:

> 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.

Id. at 7 (emphasis added).

The Intervention Decision's rationale for permitting Ms. Breen to intervene in the ATO Contest also directly supports her standing to file the Breen Contest. *Id.* at 6-7. As was explained in the Intervention Decision, Circular A-76 "places a premium on ensuring fair treatment for all potential service providers, including federal employees and their representatives." *Id.* at 3. As the Intervention Decision noted, the Final Report of the Congressionally-mandated 2002 Commercial Activities Panel recommended the use of an "Integrated Competition Process" for Circular A-76 activities 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*." (Emphasis added).

The ODRA Contest Rules apply to all contests of FAA competitions conducted under Circular A-76. *See* CR 1. In drafting its Contest Rules, the ODRA recognized that the interests of the ATO may not always coincide for all purposes with those of the majority of the directly affected employees. The ODRA Contest Rules therefore expressly permit a private sector service provider, the ATO *and* an employee representative such as Ms. Breen to file a Contest.

CONCLUSION

For the reasons set forth in its Intervention Decision, the ODRA finds that Ms. Breen has demonstrated that she satisfies the standing requirements of Contest Rule 2(g). She therefore is entitled to be treated as a directly interested party under the ODRA Contest Rules. The Motion to Dismiss is denied.

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Anthony N. Palladino
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April 8, 2005