

Legal News

Depot Maintenance

Court of Federal Claims Rebuffs AFGE's FAIR Act Challenge to A-76 Cost Comparison That Resulted in Contracting Out of Distribution Center Work to EG&G

The American Federation of Government Employees' challenge to the contracting out of federal jobs at a supply distribution center in California was dismissed May 10 by the U.S. Court of Federal Claims (*American Federation of Government Employees v. United States*, Fed.Cl., No. 00-130C, 5/10/00).

"Congress did not intend for federal employees and their unions to be able to challenge cost comparisons," Judge Nancy B. Firestone declared.

In deciding an issue of first impression for the court, Firestone said that displaced federal workers and their unions lack standing to challenge a cost comparison under the Federal Activities Inventory Reform (FAIR) Act and Office of Management and Budget Circular A-76.

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JUDGE NANCY B. FIRESTONE,
U.S. COURT OF FEDERAL CLAIMS

Under FAIR, federal workers and their unions may challenge the inclusion of particular activities on the list of those considered not inherently governmental, or omissions from the list, but not the subsequent cost comparisons leading to contracting out of such services, the court explained.

After a public-private cost comparison, the Defense Logistics Agency selected EG&G Logistics of Manassas, Va., to perform the material distribution work done by federal employees at the Defense Distribution Center in Barstow, Calif. The AFGE and three federal employees at the center appealed. DLA last March 10 affirmed the selection of EG&G to perform the work (73 FCR 301).

On March 16, AFGE filed a postaward protest seeking to block performance by EG&G (73 FCR 361). The union asserted that DLA failed to ensure that it made its cost comparison of the in-house and contractor proposals based on the same scope of work and performance requirements. In addition, AFGE said DLA did not evaluate all of EG&G's costs or determine that the firm's proposed prices were fair and reasonable.

The union cited co-plaintiffs William J. Gately and Michelle J. Evans as among those workers who would

be adversely affected by the contract award. Both would lose their federal jobs and employee benefits.

The government sought to dismiss the lawsuit, contending that displaced federal workers and their unions lack standing to challenge an agency's cost comparison.

The issue in this case—which the court has not addressed before—is whether displaced federal workers and their unions are "interested parties" that can challenge a cost comparison study.

An attorney in AFGE's office of the general counsel told FCR May 22 the union is "disappointed" in the decision. However, "it was helpful" to have a federal court for the first time look at whether the union has the right to challenge an A-76 award under the FAIR Act, the attorney said.

"The judge considered our arguments and based on her comments appeared to understand that if the union cannot challenge an A-76 award, then no one has the ability to challenge such an award," said the attorney, who did not want to be identified. "The decision clearly exposes the lack of protection for taxpayers and indicates that legislative reform is advisable."

AFGE is "reviewing the decision and weighing all options," the attorney said.

Standing Under ADRA. Prior to 1996, jurisdiction over protests was divided between the Court of Federal Claims (for preaward protests) and the federal district courts (for postaward protests). However, in 1996 Congress passed legislation—the Administrative Dispute Resolution Act (ADRA) (Pub. L. No. 104-320)—to give both the COFC and the district courts authority over both types of protests on a four-year test basis.

In passing ADRA, Congress did not seek to limit standing to those parties that met the definition of "interested party" in the Competition in Contracting Act, the court said. Rather, it intended that the COFC hear challenges to contract awards brought by persons who would have had standing to challenge a procurement decision in federal district court under the Administrative Procedure Act.

Union Lacks Standing. According to the court, the plaintiffs' interests with respect to cost comparisons are not within the zone of interests sought to be protected by FAIR. In enacting FAIR, Congress distinguished between the agency's decision to put an activity on the list to be contracted out, and the decision to contract out the work to a particular source, the court stressed. If Congress intended to provide interested party standing

to challenge cost comparisons under a public-private competition, it would not have limited standing to challenge to the list, the court reasoned.

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AFGE ATTORNEY

Moreover, Congress recognized that even if an activity is listed as appropriate for contracting out (noninherently governmental), federal employees might be able to perform it more economically than contractors, the court said. Thus, FAIR allows for public-private competitions.

The purpose of a public-private competition is to provide the best value to the taxpayer—not to support continued employment for federal workers, the court emphasized.

The plaintiffs said they were the only parties able to enforce compliance with the cost comparison provisions where the agency determined to contract out the work. However, other displaced federal workers and their unions have made this argument without success, the court said, citing *AFGE v. Cohen*, 171 F.3d 460 (7th Cir. 1999).

False Claims Act

Supreme Court Upholds Constitutionality Of Qui Tam, but Says States Can't Be Sued

Whistleblowers have constitutional standing to bring suit under the qui tam provisions of the False Claims Act, but they may not sue states because states are not considered persons under the act, a divided U.S. Supreme Court held May 22 (*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, U.S., No. 98-1828, 5/22/00).

The court's 7-2 ruling is a blow to the defense and health care industries, which had underlying constitutionality of the qui tam provisions (72 FCR 626). Last Nov. 19—just 10 days before the scheduled oral arguments in the case—the court on its own asked the parties to submit briefs on the issue whether private persons have Article III standing to sue under the False Claims Act (72 FCR 627).

The Aerospace Industries Association, the American Hospital Association, the American Petroleum Institute, the National Defense Industrial Association, the National Association of Manufacturers, and the U.S. Chamber of Commerce all filed supporting briefs arguing that the qui tam provisions of the act are unconstitutional.

Justice Antonin Scalia, writing for six members of the court, reasoned in part that presumptions against including sovereigns within the statutory term “person” and subjecting them to punitive damages weigh against subjecting states to liability under the FCA's qui tam provisions.

Jonathan Stevens, a former employee of the Vermont Agency of Natural Resources, alleged in a qui tam suit that the agency had padded grant claims submitted to the Environmental Protection Agency. The United States declined to intervene in the case. The state agency asserted that it is not a “person” subject to liability under 31 U.S.C. § 3729(a) and that the 11th Amendment barred the suit.

The district court and U.S. Court of Appeals for the Second Circuit rejected those arguments.

Reversing, the Supreme Court first decided that the private plaintiff, or relator, had Article III standing to bring the suit. The relator does not have a private interest in the resolution of the suit, the court said, because as much could be said “of someone who has placed a wager upon the outcome.” Instead, the court found that the FCA in effect makes a partial assignment of the federal government's claim to the private relator.

Qui Tam Relators Likened to Assignees. The court reasoned that FCA relators are like assignees or subrogees who have standing to assert the injury in fact suffered by the assignor—the United States, in FCA qui tam actions. It found this conclusion buttressed by “the long tradition of *qui tam* actions in England and the American Colonies.”

States Are Not Persons. However, the court said that states may not be subjected to qui tam liability under Section 3729(a), which subjects to liability “[a]ny person” who knowingly presents a false claim to the United States, and Section 3730(b), which authorizes suits by private parties.

“We must apply to this text our longstanding interpretive presumption that ‘person’ does not include the sovereign,” the court said. Nothing in the statute overcomes that presumption, it said.

As originally enacted, the statute was aimed at private contractors accused of gouging during the Civil War, and the various amendments since that time have not broadened the term “person” to include states, it said.

The court cited three provisions of the statutory scheme in support of its holding. First, in 31 U.S.C. § 3733(f)(4), states are expressly included within the definition of “person,” but only for purposes of that section authorizing the attorney general to issue civil investigative demands to persons possessing relevant information in a false claims investigation. The absence of a similar specific definition in Section 3729 “suggests that States are not ‘persons’ for purposes of *qui tam* liability under § 3729,” the court said.

Second, the current version of the FCA imposes punitive damages, which “would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities.”

Finally, the 1986 Program Fraud Civil Remedies Act, a “sister scheme” creating administrative remedies for false claims at about the same time as significant amendments were made to the FCA, excludes states from its definition of covered “persons.”

Ginsburg: Open Question. Justice Ruth Bader Ginsburg, in a separate concurring opinion that was joined by Justice Stephen G. Breyer (who also joined the court's opinion), said the decision leaves open the ques-