

# AIR FORCE COMMERCIAL LITIGATION DIVISION



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<b>Phone:</b>	<b>Date:</b> 5/14/2010
<b>Re:</b>	<b>CC:</b>

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DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY

**By E-mail**

May 14, 2010

Glen Wolcott, Esq.  
Office of the General Counsel  
Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

RE: Protest of AFGE Local 1764 (AFGE), B-402827

Dear Mr. Wolcott:

The Air Force respectfully requests that the subject protest be dismissed prior to the filing of the agency report pursuant to 4 C.F.R. § 21.3(b). This is a protest of a proposed procurement by a nonappropriated fund instrumentality (NAFI), and, therefore is not subject to GAO jurisdiction. See GAO Bid Protest Regulation 4 C.F.R. § 21.5(g). Furthermore, as discussed in more detail below, AFGE is not an interested party entitled to protest as the employees at issue are not within the realm of "federal employees" with standing to lodge a protest pursuant to the relevant statutes and guidance.

**1 This is a proposed procurement by a nonappropriated fund activity**

AFGE protests the proposed procurement by the Air Force Central Morale, Welfare and Recreational (MWR) Fund Nonappropriated Fund Instrumentality (NAFI).<sup>1</sup> The Air Force Central MWR Fund NAFI is not a "federal agency." NAFIs are not subject to GAO jurisdiction. The GAO has stated the following with respect to its jurisdiction in these types of cases:

The statutory authority of this Office to decide bid protests of procurement actions is set forth in the Competition in Contracting Act (CICA), 31 U.S.C. § 3551 *et seq.* (1994). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for the procurement of property or services, or a written objection by an interested party to the award or proposed award of a contract. 31 U.S.C. § 3551(1).

Since the passage of CICA, our bid protest jurisdiction has not been based on the

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<sup>1</sup> AFGE has mistakenly referred to the procuring entity as the Air Force Nonappropriated Funds Purchase Office (AFNAFPO). AFNAFPO is merely the Air Force Services Directorate that uses NAF personnel to undertake procurements on behalf of these NAFIs. See Declaration attached. AFGE also has referenced the wrong solicitation number in the protest. The solicitation AFGE has referenced is an RFP that is unrelated to the Food Transformation Initiatives (FTI). The RFP AFGE cites concerns Family Member Programs Business Management Solutions. The RFQ that covers FTI is F41999-10-Q-0495. *Id.*

expenditure of appropriated funds or on the existence of some direct benefit to the government. *Americable Int'l, Inc.*, B-251614; B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336. Instead, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. *Id.*

In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 472(1994). 31 U.S.C. § 3551(3). As defined therein, an executive branch federal agency includes any executive department or independent establishment, including wholly-owned government corporations. **NAFIs, such as NEXCOM, do not meet the statutory definition of federal agencies; although NAFIs are government instrumentalities and are generally recognized as being associated with and generally supervised by their respective government entities, NAFIs operate without appropriated funds and are not themselves federal agencies.** *Military Equip. Corp. of Am.*, B-253708, June 11, 1993, 93-1 CPD ¶ 455; *University research Corp.*, B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. As such, NAFIs are beyond our bid protest jurisdiction and, consequently, we generally will not review procurements conducted by these entities.

*LDDs Worldcom*, B-270109, Feb 6, 1996, 96-1 CPD ¶ 45 (emphasis added). Procurements by the Air Force Central MWR Fund, a NAfi, are not subject to GAO jurisdiction. 4 C.F.R. § 21.5(g). For this reason, the protest should be summarily dismissed.

## **2. AFGE is not an “interested party” entitled to protest the proposed procurement.**

The basis for AFGE’s protest is that the Air Force has violated 10 U.S.C § 2461 and the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, Pub. L. 111-84, 123 Stat. 2191 (2009) (2010 NDAA), because it failed to conduct a private/public competition in accordance with Office of Management and Budget (OMB) Circular A-76 prior to the proposed conversion of the non-appropriated employee functions to contractor-performed functions. Protest, pp. 1, 2. The protest does not state why AFGE has any standing to bring this protest.

The National Defense Authorization Act of Fiscal Year 2008 (2008 NDAA), amended the definition of “interested party” to include representatives of federal employees engaged in an activity or function for which a public-private competition is conducted. Pub. L. No. 110-181, § 326(a), 122 Stat. 3, 62 (2008). The 2010 NDAA does not change this definition, but does state that the Government must conduct private/public competitions only when functions performed by “Department of Defense civilian employees” may be converted to performance by a contractor. 2010 NDAA, § 321. 123 Stat., 2919, 2250. 10 U.S.C. § 2461(a) (1) uses language identical to the 2010 NDAA, referring to “Department of Defense civilian employees” at the outset of the statute.

Neither the 2010 NDAA nor 10 USC § 2461 define the term “Department of Defense civilian employee.” However, OMB Circular A-76, the implementing guidance for how and when to conduct a public/private competition, defines a “Civilian Employee” as follows:

An individual who works for a federal agency on an appointment without time limitations who is paid from appropriated funds, which includes working capital funds. A . . . **non-appropriated fund employee . . . is not** included in this definition.

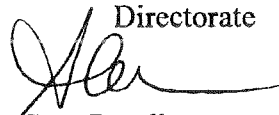
Office of Management and Budget Circular No. A-76, Appendix D, at D-2 (May 29, 2003).

Although AFGE alludes to "DOD civilian employees" a couple of times in the protest, as noted in the attached Declaration, the personnel identified for potential displacement are all non-appropriated fund (NAF) employees performing the food services referenced in the protest.<sup>2</sup> See Declaration of William Foran, Attachment. AFGE simply is mistaken in its assertion in the second paragraph of the protest that "[a]n award from this acquisition process will result in conversion of DOD civilian employees [sic] performance of food services to private operation at six (6) Air Force Bases." See Attachment. Therefore, the NAF employees represented by AFGE are not "Department of Defense civilian employees" covered by 10 U.S.C. § 2461 or the 2010 NDAA, H.R. 2647. Accordingly, AFGE does not have standing as an "interested party" to protest the potential conversion of NAF employees' performance of food services to performance by one or more contractors.

The protest is a protest of a potential procurement by a nonappropriated instrumentality that is not a wholly-owned corporation of a federal agency, and, therefore is not within GAO's jurisdiction pursuant to 4 C.F.R. §21.5(g). Furthermore, AFGE is not an "interested party" with standing to bring this protest. For these reasons, the protest should be dismissed.

Sincerely,

THOMAS J. HASTY III, COLONEL, USAF  
Director, Commercial Law and Litigation  
Directorate

  
Gary R. Allen  
Senior Trial Attorney

Enclosure:

cc: John P. Santry  
Via fax (707) 437 9352.

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<sup>2</sup> AFGE mistakenly refers to the 60 employees at Travis AFB that may be affected by any conversion as "DoD Civilian Employees." As the Declaration notes, in fact, the potentially affected employees are NAF employees. See Attachment. Any other employees that might be affected at Travis AFB are employees of private entities, and are not Department of Defense (DoD) civilian employees. See Declaration. None of the positions currently filled by APF employees are subject to displacement. The NAF food operations at the other five bases are staffed with NAF employees. *Id.*

**DECLARATION**

I declare under penalty of perjury that the following facts are true and accurate with regard to the Air Force Food Transformation Initiative (FTI) as being implemented by Air Force Central MWR Fund Nonappropriated Fund Instrumentality (NAFI) Request for Quotations F41999-10-Q-0495:

1. Though AFGE Local 1764 represents both appropriated fund (APF) and non-appropriated fund (NAF) employees, only NAF employees will be potentially displaced at Travis AFB upon implementation of the FTI contract.
2. No APF employees will be displaced at Travis AFB or at any of the other five bases in the portfolio.
3. The only positions subject to displacement at the APF food operations at the Air Force bases referenced in the protest are positions filled by employees of private entities (contractor employees).
4. The nonappropriated fund food operations at each of the bases are staffed by NAF employees. These NAF employees may potentially be displaced upon implementation of the subject contract.
5. The AF Central MWR Fund is the NAFI responsible for contracting RFQ F41999-10-Q-0495, exclusively with nonappropriated funds.
6. AFGE Protest improperly cites RFP F41999-10-R-0003 as the FTI procurement.



WILLIAM A. FORAN

Director

Air Force Non-Appropriated Fund Purchasing

Date: 14 May 2010