



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Asiel Enterprises, Inc.

File: B-408315.2

Date: September 5, 2013

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.
W. Michael Rose, Esq., and John G. Terra, Esq., Department of the Air Force, for the agency.
Robert T. Wu, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's use of public interest exception under 10 U.S.C. § 2304(c)(7) (2006) to justify transferring an appropriated fund mission essential requirement to a nonappropriated fund instrumentality using a memorandum of agreement under the authority established by 10 U.S.C. § 2492 (2006) is sustained where the transfer is outside the scope of section 2492 and the public interest exception on which the agency relies is applicable only to procurements, and use of the memorandum of agreement is not a procurement.

DECISION

Asiel Enterprises, Inc. (Asiel), of Corpus Christi, Texas, protests the decision by the Department of the Air Force to acquire essential messing services at Barksdale Air Force Base (AFB), in Louisiana, and at Dyess AFB, in Texas, from the Air Force Mission Essential Feeding Fund (AFMEFF), an Air Force Supplemental Mission Nonappropriated Fund Instrumentality (NAFI), under a memorandum of agreement (MOA) without use of competitive procedures. The protester argues that the agency unreasonably justified its use of the MOA with a determination by the head of the agency under 10 U.S.C. § 2304(c)(7) that use of the MOA is necessary in the public interest to implement the Air Force's Food Transformation Initiative.

We sustain the protest.

BACKGROUND

This protest concerns the Air Force's Food Transformation Initiative (FTI), a program designed to fundamentally change the way in which the Air Force obtains "mission essential food services" and operates non-mission essential food services provided within the Morale, Welfare, and Recreation (MWR) system. This matter was the subject of a prior decision by this Office, Asiel Enterprises, Inc., B-406780, B-406836, Aug. 28, 2012, 2012 CPD ¶ 242.

In our prior decision, we sustained a protest filed by Asiel challenging the decision of the Air Force to acquire essential messing services at Barksdale AFB and at Dyess AFB from the AFMEFF, a supplemental mission NAFI,¹ without obtaining competition as required by the Competition in Contracting Act of 1984 (CICA) or following the procurement rules established by the Federal Acquisition Regulation (FAR). In reaching this decision, we rejected the Air Force's contention that it could obtain these requirements non-competitively through a MOA established between the Air Force and the AFMEFF, under the authority of 10 U.S.C. § 2492. 10 U.S.C. § 2492 provides as follows:

An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system.

We concluded that section 2492 did not apply to the MOA at issue since the services being provided were not for the benefit of the MWR system, as expressly contemplated by section 2492, but were provided for the benefit of a mission essential, non-MWR activity. As a consequence, we recommended that the Air Force terminate its agreement with the AFMEFF to the extent it provided for the provision of mission essential food services at Barksdale AFB and Dyess AFB.²

¹ A supplemental mission NAFI is "[a] NAFI designated to receive [nonappropriated funds] generated as the result of installation operation of mission programs such as training, food service, education, and security. Examples include the Athletic Association Fund and Dependent Schools Funds." Department of Defense Instruction (DoDI) 1015.15, October 31, 2007.

² Our prior decision was necessarily limited to these two bases. However, recognizing the broader implications of our decision, we recommended that the Air Force consider extending the application of our recommendation to other installations covered by FTI as well.

Further, we recommended that the Air Force award the essential messing requirements at these locations on a competitive basis or prepare a Justification & Approval (J&A) which reasonably supports using the AFMEFF to provide these requirements, and which is consistent with the requirements of CICA and the FAR.

By letter dated February 13, 2013, the Air Force notified this Office that, in response to our recommendations, it executed a determination with a justification and findings (D&F) document pursuant to 10 U.S.C. § 2304(c)(7) “that the Food Transformation Initiative cannot be successfully implemented without the ‘other agreement’ with the AFMEFF, and that the continuing use of the ‘other agreement’ to implement this important initiative is in the public interest.” Agency Report (AR), Exh. 4, Ltr. from Air Force, Feb. 13, 2013. Section 2304(c)(7) provides in pertinent part, “[t]he head of an agency may use procedures other than competitive procedures only when the head of the agency determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned. . . .” A determination signed by the Secretary of the Air Force was enclosed with the letter.

The D&F, approved by the Secretary, concludes “that it is in the public interest to enter into an ‘other agreement’ with an Air Force non-appropriated fund instrumentality (NAFI), specifically, the [AFMEFF], and to use contractor qualification requirements and other than competitive procedures to implement the Food Transformation Initiative (FTI).” AR, Exh. 3. The determination points to 10 U.S.C. § 2492 as the authority for the Air Force to enter into the “other agreement” with the AFMEFF. It also points to a Department of Defense waiver and approval of the Air Force’s FTI strategy, dated August 4, 2010. *Id.* The waiver sought and obtained by the Air Force was to a prior policy issued by the Under Secretary of Defense for Personnel and Readiness, dated December 29, 2004, which clarified the purposes for which DoD NAFls could enter into contracts and other agreements with DoD elements and other federal departments, agencies, or instrumentalities, pursuant to 10 U.S.C. § 2492. This policy expressly recognized that the military services may be using the authority granted in 10 U.S.C. § 2492 for other than its intended purpose by entering “into agreements with DoD NAFls to provide goods and services that are not within the authorized activities of or of direct benefit to exchanges and [MWR] programs.”³ Undersecretary of Defense – Personnel and Readiness Memorandum, dated December 29, 2004.

³ To the extent that the Air Force argues that this waiver authorized use of 10 U.S.C. § 2492 to implement FTI, we disagree. There is no authority for the DoD to expand the scope of a statute through waiver, and as discussed herein, section 2492 does not authorize the use of a NAFI MOA in this instance. Moreover, we read the December 29, 2004 policy memorandum to place additional restrictions, such as avoiding displacement of Ability One contractors and small business

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The 2013 D&F underlying the decision to utilize non-competitive procedures to enter into the MOA identifies six “objectives and benefits,” which are summarized as: (1) food service modernization, elimination of waste and maximizing efficiencies; (2) enhancement of combat feeding capabilities by utilizing industry leaders for training; (3) utilizing the AFMEFF, which is uniquely qualified to implement FTI; (4) use of qualification requirements to maximize competition and access industry leaders; (5) enhancement of mission readiness; and (6) increased customer satisfaction. AR, Exh. 3 at 1-2.

On May 15, 2013, the agency provided Asiel with a copy of the D&F that it had executed in support of FTI. The instant protest followed, challenging the agency’s determination not to compete the essential messing requirements at Barksdale and Dyess, and arguing that the agency failed to implement the recommendation by our Office in connection with the prior decision.⁴

DISCUSSION

Asiel’s primary contention is that the Air Force’s justifications for procuring mission essential food services at Barksdale and Dyess without obtaining competition under CICA is not sufficiently compelling to support use of the public interest exception to CICA’s full and open competition requirements.⁵ Protest at 2; 10 U.S.C. § 2304(c)(7). Asiel argues, “the public interest exception is limited to circumstances that are truly beneficial to a vital public interest, which is something much more than a potential savings of money.” *Id.* In attacking various aspects of the agency’s determination, Asiel argues that none of the rationales set forth by the Air Force in the agency’s determination support limiting the competition for these services to

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concerns. To the extent that these requirements are more restrictive than the statute itself, DoD would have authority to waive those requirements.

⁴ Asiel filed an initial protest with this Office on May 14, 2013, alleging that the agency had taken no action in response to the recommendation issued by our Office. Upon the agency’s submission of the D&F, and Asiel’s subsequent challenge of the reasonableness of the D&F, we dismissed Asiel’s initial protest as being effectively moot.

⁵ Asiel also challenges the timing of the agency’s invocation of the public interest exception to competition at 10 U.S.C. § 2304(c)(7) to justify the award of its contracts to Aramark and Sodexo. Asiel argues that the D&F is an invalid post-facto justification of the awards, which is contrary to the plain language of the statute. Protest at 2.

Aramark or Sodexo, the two contractors selected by the AFMEFF in connection with the MOA, at the two installations in question.⁶ Protest at 3-5.

As a general matter, CICA provides that when conducting procurements for property and services, agencies are required to obtain full and open competition through the use of competitive procedures, in accordance with statute and the FAR. 10 U.S.C. § 2304(a)(1)(A). One exception to this requirement for competition is if the head of the agency determines that it is necessary in the public interest to use other than competitive procedures in any “particular procurement.” 10 U.S.C. § 2304(c)(7). The authorizing official must make a written determination and finding supporting use of the public interest exception that “set[s] forth enough facts and circumstances to clearly and convincingly justify the specific determination made.” FAR §§ 6.302-7(c)(1), 1.704; Sikorsky Aircraft Corp., B-403471, B-403471.3, Nov. 5, 2010, 2010 CPD ¶ 271 at 4. 10 U.S.C. § 2304(c)(7) also has a second requirement. The head of the agency must “[notify] the Congress in writing of [the] determination not less than 30 days before the award of the contract.” 10 U.S.C. § 2304(c)(7)(B). Generally, our review of a D&F issued by an agency in support of the public interest exception to full and open competition addresses whether the D&F provides, on its face, a clear and convincing justification that the restricted competition furthers the public interest identified. We consider a protester’s arguments that the D&F relies on facts that have no relation to the stated public interest, or that the D&F relies on materially inaccurate information. We will not, however, sustain a protest based on the protester’s disagreement with the conclusions set forth in the D&F. Sikorsky Aircraft Corp., supra, at 5.

As noted above, in response to our prior decision, the Air Force executed a D&F justifying its MOA with the AFMEFF to implement the FTI under the public interest exception to CICA’s competition requirements. In doing so, the agency continues to rely on 10 U.S.C. § 2492 as its authority for entering into the agreement with the AFMEFF. The Air Force’s actions in this regard rest on two fundamental errors. First, the Air Force relies on section 2492, which our Office previously considered and rejected. Second, the Air Force improperly invoked CICA’s public interest exception, which under 10 U.S.C. § 2304(c)(7) is applicable to procurements, not a MOA as the Air Force is using here. The MOA is not a procurement vehicle to which CICA’s public interest exception would apply. An essential element of our prior decision was that absent authority under section 2492, the Air Force was

⁶ As explained more fully in our prior decision, the AFMEFF sought pre-qualified sources to perform FTI at various groups of installations separated into “portfolios” by the agency. Two of the companies that were pre-qualified and ultimately received Nonappropriated [Fund] Purchasing Agreements (NPAs) were Sodexo and Aramark. The Air Force anticipated that these companies would then compete for purchase orders to be issued under the terms of the NPAs for work at the portfolio installations. Asiel Enterprises, Inc., supra, at 2-3.

required to procure mission essential food services in accordance with CICA; we did not recommend that the agency use CICA to justify the MOA. Contrary to our prior recommendation, the Air Force has not followed CICA, which by its terms contemplates a procurement and the award of a contract. Rather, the Air Force seeks to justify its continued use of the NAFI MOA, which the agency readily admits is not a contract.⁷

In essence, the agency now asks us to reverse our decision in the prior protest, which we decline to do. We have considered the agency's arguments in support of its interpretation of section 2492, and, as set forth below, we remain convinced that the agency's interpretation of this statutory authority is inconsistent with the letter and the spirit of the statute. Further, because use of a NAFI MOA is not an appropriate method for the Air Force to obtain mission essential food services from the AFMEFF and because the Air Force cannot rely on this non-procurement agreement as the basis to invoke the public interest exception under CICA, the agency failed to properly implement our recommendation.

Section 2492 provides authority for agencies and instrumentalities that support the operation of the MWR system to enter into contracts and other agreements with other governmental entities that are beneficial to the efficient management and operation of that MWR system. Our review of the agreement leads us to conclude that it is not for the benefit of the MWR system, as the statute contemplates. Instead, the MOA between the Air Force and the AFMEFF provides for transferring appropriated funds to the AFMEFF to implement the Air Force's mission essential feeding requirement. AR, Exh. 125. Feeding that is essential to the Air Force's mission, by definition, is not part of the MWR system.⁸ Section 2492, by its terms,

⁷ According to the Air Force, the NAFI MOA is not a contract; rather, it is an agreement entered into under the authority established by 10 U.S.C. § 2492. See Air Force's Post Hearing Comments at 19. Additionally, the agency argues that this Office lacks jurisdiction over this matter because the agency's D&F is not a procurement action. Air Force Memorandum of Law at 10-13. We agree that the D&F is not a procurement action. The D&F here is written to justify the management approach the Air Force is taking to implement its FTI program. The D&F does not address the ultimate procurement actions--i.e., the contracts for services at Barksdale and Dyess. We assert jurisdiction over this matter to determine if the Air Force is utilizing the NAFI as a conduit to circumvent the requirements of CICA and the FAR. Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8 at 2; LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 at 3-4.

⁸ At a hearing convened by our Office, two of the Air Force's witnesses, both senior members of the Department of Defense, were clear that mission essential food services are not part of the MWR system. Indeed, the Air Force now states, "Under the FTI, the DFACs do not necessarily become part of the MWR program, however,
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authorizes transactions that are beneficial to the MWR system, and is inapplicable to the transaction contemplated here.

The inapplicability of section 2492 to this transaction is even more apparent given the fact that under the NAFI MOA, the only required services are the mission essential feeding requirements. The non-essential feeding requirement, traditionally part of the MWR system, is only included as an option; an option which, according to the Air Force, will not be exercised at either Barksdale or Dyess. Tr. at 154-56, 206. Consequently, according to the Air Force, the non-essential food services at the two installations at issue in this protest will not be included in this transaction.

Rehashing an argument previously rejected by our Office, the agency contends that section 2492 authorizes the transaction contemplated by the NAFI MOA because the MWR system benefits from the agreement. Specifically, the agency asserts the benefits to the MWR system provided by FTI include: compensation to the AFMEFF of 1.5% of the amount of appropriated funds transferred under the MOA; integration of the mission essential feeding function and the non-essential feeding function, which allows for strategic planning, leading to greater efficiencies and cost savings; and an expanded customer base for the MWR system due to the expansion of essential mess card use to non-essential food establishments. Agency's Post-Hearing Comments at 13-14. These arguments are essentially the same as those advanced previously. We continue to find these arguments unpersuasive.

In our prior decision we explained, “[w]hile section 2492 authorizes a NAFI such as the AFMEFF to enter into an agreement with the Air Force to provide services beneficial to the efficient management and operation of the MWR system, there is nothing to suggest that it authorizes an agreement between the NAFI and the Air Force for the provision of mission essential services on the theory that consolidating such activities under the MWR system may provide a benefit to the MWR system.” Asiel Enterprises, Inc., *supra*, at 5.

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they are being operated in conjunction with the MWR system.” Agency's Post-Hearing Comments at 18.

NAFIs under the MWR system have a historical basis and exist to help foster the morale and welfare needs of military personnel and their dependents.⁹ There is nothing to indicate that NAFIs were established to perform the primary mission needs of military departments. DoD recognizes the role of NAFIs as integral to MWR programs, which are designed to build healthy families and communities, to provide support services commonly furnished by other employers and governments, to encourage positive individual values, to aid in recruitment and retention of personnel, and to provide generally for the quality of life and well-being of service members and their families. DoDI 1015.10, July 6, 2009 at 2. Within DoD, food and beverage programs (the optional MWR component under FTI), are highly desirable programs that contribute to building a sense of community and enjoyment. Id. at Encl. 5. These activities are expected to be revenue generating and receive limited appropriated fund support. Id. The MWR non-essential food services function, as a community support program, serves as an adjunct to supplement the historical mission requirement to provide service members with subsistence, currently codified at 37 U.S.C. § 402 (basic allowance for subsistence) and 10 U.S.C. § 9561 (Air Force ration entitlement).

In the past, there have been concerns about the provision of appropriated funds to MWR programs. This has led to a general rule that appropriated funds are not available to MWR programs, except as authorized by Congress. See e.g., 27 Comp. Gen. 679 (1948) (Navy appropriations not available to hire full-time or part-time employees for recreational programs for civilian employees of Navy). Currently, however, there are instances where appropriated funds are made available to DoD MWR programs, particularly to mission sustaining programs. DoDI 1015.10 at Encl. 5. Specifically, 10 U.S.C. § 2241 provides statutory authorization for DoD to use operations and maintenance funds to support MWR programs. Further, 10 U.S.C. § 2491 authorizes DoD to treat these appropriated funds as nonappropriated funds when made available for MWR programs, under regulations prescribed by the agency. The unifying thread between these two statutes is that they are both part of a statutory scheme for agencies to utilize appropriated funds to support MWR programs. Neither of these statutory authorities, however, are available to the Air Force here because mission essential feeding is not a MWR program, and is not part of the MWR system.

As we explained in our prior decision, the Air Force's interpretation of section 2492 would constitute a radical departure from the general understanding that MWR NAFIs engage in MWR-related activities, and it is with consideration of the above historical, statutory, and regulatory framework that we reach our conclusion regarding the scope of the statute. Because it is clear that the transaction

⁹ For additional background on the historical basis for MWR NAFIs see Principles of Federal Appropriations Law, Vol. III, ch. 15, at 15-234 (3rd ed. 2008) (commonly known as the Red Book).

established under the NAFI MOA is for the primary benefit of the Air Force in its performance of its essential mission (*i.e.*, mission essential feeding), we do not view incidental benefits provided to the MWR system to authorize use of section 2492.¹⁰

As we previously held, without authority under section 2492, the only way for the Air Force to transfer appropriated funds to the NAFI and then use the NAFI to assist the Air Force with its essential mission requirements, would have been through a competitive procurement. Asiel Enterprises, Inc., *supra*, at 6. Yet, despite our prior decision, the Air Force continues to utilize a NAFI MOA as the basis for implementing FTI.

In what appears to have been an effort to comply with our recommendation, the Air Force chose to justify its MOA under CICA's public interest exception. However, this approach constitutes a misapplication of CICA's public interest exception. The Air Force asserts that the MOA is not a contract. We note that a MOA is not a procurement method recognized by statute¹¹ or under the FAR. Therefore, CICA's competition requirements would not apply here as CICA only applies to procurements conducted by agencies. 10 U.S.C. § 2303. Consequently, the Secretary's D&F cannot rationally justify use of the NAFI MOA for the simple reason that the D&F under CICA's statutory exception to competition is only applicable to procurements, which the NAFI MOA is not.

To the extent the agency argues that it relied on our prior decision, its reliance is misplaced. Our prior decision was clear that obtaining mission essential food services at Barksdale and Dyess was only possible through a procurement, either utilizing competitive procedures, or by justifying a contract award on a sole-source basis. Consequently, we view the agency's continued reliance on section 2492 and use of a NAFI MOA to implement FTI as sufficient grounds to sustain this protest.

Finally, in defending this protest, the record submitted by the Air Force largely focused on the implementation of FTI and its numerous benefits; not on the challenged contract awards at Barksdale and Dyess. For the record, we do not take issue with the Air Force's implementation of FTI, or the stated benefits of the program set forth in the D&F, and explained during this protest. Indeed, the record

¹⁰ It appears from the record that the 1.5% transaction fee paid to AFMEFF does not provide any tangible benefit to the MWR system. Instead, it appears to compensate the AFMEFF, which was established in order to fund the mission essential feeding requirement, for its efforts in managing this requirement.

¹¹ The term "procurement" is defined as including "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111. (emphasis added).

supports the agency's use of many of the performance-based contracting concepts underlying FTI, including the benefits and efficiencies identified by the agency. Our decision should not be read to mean that we think the Air Force is required to implement FTI through a competitive contract award to a NAFI. For instance, the agency could also retain responsibility for FTI, while contracting for the mission essential food services requirement. However, to the extent the Air Force has used the AFMEFF to perform the function of awarding contracts for the provision of mission essential food services at Barksdale and Dyess, the awards need to be made consistent with CICA and FAR.

RECOMMENDATION

As we indicated in our prior decision, we recommend that the Air Force terminate its agreement with the AFMEFF to the extent it provides for the provision of mission essential food services at Barksdale AFB and Dyess AFB, and that the Air Force award the contracts consistent with the requirements of CICA and the FAR.¹² We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel

¹² As noted in our previous decision, our recommendation is necessarily limited to the Air Force's mission essential food service requirements at Barksdale and Dyess, however the problems identified in this decision apply equally to all Air Base mission essential food service requirements that have been transferred to the AFMEFF under the FTI program, to date. Thus, in our view, the Air Force should consider extending the application of our recommendation to these installations as well.