

Unequal Rights in Outsourcing Fights

Some unions can protest in more places than others.

BY AMELIA GRUBER

Come October, the Federal Aviation Administration plans to transfer flight service work performed by nearly 2,300 civil servants, including about 1,800 members of the National Association of Air Traffic Specialists, to Bethesda, Md.-based contracting giant Lockheed Martin Corp. But Kate Breen, the outspoken president of the union, isn't about to let that happen without a fight.

In mid-March, Breen filed an appeal with FAA's Office of Dispute Resolution for Acquisition, alleging procedural errors in the agency's February decision to award the work to Lockheed as the result of a public-private job competition. Should she lose her case, she could ask a federal appeals court to review FAA's decision.

Other union leaders aren't as lucky.

Unions have been engaged in a long fight over rights to appeal decisions in competitive sourcing studies. Such studies are run under Office of Management and Budget Circular A-76, which allows contractors to bid on federal jobs classified as "commercial" on Fed-

eral Activities Inventory Reform Act lists. The Government Accountability Office—which hears contractors' appeals of procurement decisions—has declined to consider protests filed by federal employees on the losing end of job competitions.

But revisions to Circular A-76 in 2003 expanded the definition of "interested parties" able to contest decisions at the agency level. The revisions granted protest rights to agency tender officials—the formal representatives of the in-house team in public-private competitions. An official elected by a majority of employees on the in-house team also can file internal agency appeals.

Though the modification didn't explicitly mention protests *outside* agencies, the new wording created an opening for unions to argue that GAO should hear their cases. What's more, the fiscal 2005 Defense authorization bill, enacted in late 2004, amended the law GAO follows in deciding which protests to hear, giving agency tender officials appeal rights at GAO.

In April, GAO announced it will hear agency ten-

PATH TO PROTEST If union chief Kate Breen loses her FAA outsourcing case, she can go to court.



DAVID HILLS

der officials' appeals of job competitions if they involve more than 65 positions and were initiated before Jan. 26, 2005. The policy did not, however, extend these rights to other officials elected to represent in-house teams. Union officials had argued that agency tender officials cannot necessarily be trusted to represent the interests of the in-house team.

Breen's case is different because FAA contracts follow the rules of the agency's Acquisition Management System, established in the mid-1990s, rather than the Federal Acquisition Regulation, which covers most agencies. Her complaint was the first A-76 protest filed at FAA, so she wasn't positive the agency's acquisition dispute office would hear her case.

But in an April 8 decision, Anthony N. Palladino, associate chief counsel and director of the office, accepted her complaint. FAA's acquisition dispute rules allow appeals by "a single individual

appointed by a majority of directly affected FAA employees as their agent."

As it turned out, the agency tender official also decided to appeal FAA's February outsourcing decision, and the two cases have been combined. The tender official's decision pleasantly surprised Breen. She feels it added credence to her complaint. "It's not just the union whining again," she says.

Nevertheless, unions should continue to weigh in separately because their appeals raise important issues tender officials might not, Breen says. For example, her case questions the way FAA calculates prevailing wages for the jobs involved. She says that contrary to Labor Department standards, FAA has not updated the rate for almost two decades. The union "gives the employees a voice," Breen says.

Palladino's decision to grant Breen standing also is significant because his

office's decisions can be appealed to the federal courts. This option is not available to union officials during internal protests at other agencies. The bodies that hear appeals of FAR-based procurements—GAO and the Court of Federal Claims—only accept protests filed by contractors and, as in GAO's case, agency tender officials.

Dan Duefrene, a National Federation of Federal Employees representative in California, doesn't begrudge Breen her day in court. He just wishes his union had the same rights. "It doesn't seem fair that FAA has a different venue than everybody else," he says. GAO rejected an A-76 appeal Duefrene filed last year.

The American Federation of Government Employees also envies Breen. AFGE lobbyist John Threlkeld says there's "no plausible rationale" for depriving employees in other agencies of independent third-party appeal rights. 