

Michelle Kikta <MKikta@IUOE.ORG>
12/19/2002 03:32:05 PM

Record Type: Record

To: David C. Childs A-76comments/OMB/EOP@EOP

cc:

Subject: Proposed Revisions to OMB A-76

See attached

- Proposed revisions to A-76 Circular.doc

December 18, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
New Executive Office Building, Room 9013
725 17th Street NW
Washington, DC 20503

Via E-Mail and Regular Mail

Re: Proposed Revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities"

Dear Mr. Childs:

The International Union of Operating Engineers (IUOE) represents over 400,000 workers in the United States and Canada. Over 120,000 of these workers are employed at many different types of facilities, including hotels, hospitals, commercial office buildings, and US government-owned facilities including office buildings, military bases, and research laboratories. These IUOE members operate and maintain a variety of mechanical, electrical, electronic and plumbing systems at these facilities, including all types of heating, ventilation and air conditioning systems, automated building control systems, fire/life safety systems, elevators and escalators. At these federal facilities, government contractors covered by the provisions of the Service Contract Act (SCA) employ our members.

The IUOE does not wish to address the changes of Circular A-76 specifically, however, we would like to express our concern about potential abuses that are inherent to private contracting under the SCA. As a by-product of the A-76 process, many new SCA opportunities will be available for contractors.

In our experience, unscrupulous contractors will exploit SCA-covered workers. These contractors will seek to actively deny these workers their rights under the SCA and the National Labor Relations Act.

The Federal Acquisition Regulations (FAR) provide for reimbursement to federal government contractors for the cost of "allowable" labor relations costs. (See FAR Subpart 31.2 - Contracts with Commercial Organizations - 31.205-21, Labor relations costs: "Costs incurred in maintaining satisfactory relations between the contractor and its employees, including the costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.) However, federal agencies have interpreted this provision very broadly, to the point of funding contractors' campaigns against labor unions, despite federal agencies supposed neutrality regarding negotiations between contractors and unions, and the preference of federal law in favor

of collective bargaining. This provision and others have allowed contractors to extract large sums of taxpayer money from the government while breaking federal labor and wage and hour laws.

One federal government contractor, LB&B Associates Inc, of Columbia, Maryland, fits this example. LB&B is a contractor with a long history of violating federal laws that has used the system to waste taxpayer dollars fighting LB&B employees' right to organize and bargain collectively. Contractors like LB&B Associates are a serious liability for the government.

Background

Incorporated in North Carolina in 1993, LB&B Associates ("LB&B") is a privately held corporation registered in 1995 with the US Small Business Administration's 8(a) program for small, disadvantaged businesses (SBA Case #102123). According to the SBA, 8(a) companies receive special government contract set aside privileges "to assist eligible small disadvantaged business concerns to compete in the American economy through business development."

Although LB&B was slated to "graduate" from 8(a) status on April 6, 2004, LB&B apparently grew too large for the program and has "graduated". However, LB&B recently signed an SBA mentor-protégé agreement with Olgoonik Logistics LLC, an Alaskan Native village corporation and a subsidiary of the Arctic Slope Regional Corporation (ASRC). Olgoonik has also been certified as an 8(a) firm. As such, LB&B can partner with Olgoonik and continue to pursue set-aside contracts through joint ventures with Olgoonik.

Lily Liang Brandon is the President and Chief Executive Officer of LB&B. Ms. Brandon, a Taiwanese-American, holds 91 percent of the company's stock in her name. However, Chief Operating Officer Ed Brandon, Mrs. Brandon's husband, handles day-to-day operations of LB&B. Ed Brandon was previously President of Jones Operations, a subsidiary of J. A. Jones Corporation, a large construction and engineering firm based in North Carolina.

LB&B has more than 1,000 employees nationwide. Approximately one-half of these employees are represented by labor unions including the International Union of Operating Engineers (IUOE), the International Association of Machinists (IAM), the International Brotherhood of Electrical Workers (IBEW), the Laborers International Union of North America (LIUNA) and the United Association of Plumbers and Pipefitters (UA).

LB&B has more than 40 contracts with federal agencies in 24 states and the District of Columbia. These agencies include the Army, Navy, Air Force, Marine Corps, General Services Administration, National Aeronautics and Space Administration, the Department of Agriculture and the Internal Revenue Service. The three largest contracts by dollar amount and number of employees are for facilities operations and maintenance at Fort Carson, Colorado; NASA Goddard Space Flight Center in Greenbelt, Maryland; and the USDA Plum Island Animal Disease Center in New York.

LB&B's revenue from these contracts exceeded \$40 million in 2001. The company's contracts range from highly sophisticated computer simulation training, flight simulator maintenance/repair to facility operations and maintenance contracts.

Plum Island and the IUOE

LB&B is in the midst of a labor strike at the US Department of Agriculture's Plum Island Animal Disease Center, located near Long Island, New York. Seventy-six Plum Island employees represented by IUOE Local 30 were forced out on strike on August 13, 2002 after rejecting a final offer from LB&B. The workers-who operate the ferry transportation to the island, the emergency response team, the power plant, wastewater treatment facility and maintain the buildings and grounds-have been without a contract at Plum Island since September 2001. IUOE Local 30 has filed unfair labor practices against LB&B over management's actions related to the time leading up to this strike.

The IUOE is also investigating various aspects of LB&B's labor relations and management policies at Plum Island as well as in other locations. The IUOE believes LB&B has billed the USDA excessive amounts for the cost of labor relations and legal fees. The union has filed a request under the Freedom of Information Act with USDA for documentation related to this charge. USDA has responded by stonewalling and denying the union's request, which the union is appealing.

There are a number of issues that we think raise legitimate questions about the relationship between LB&B and the USDA. We believe that the USDA has not maintained strict neutrality during the strike, and that the relationship between USDA and LB&B has been extremely cozy since the award of the first contract to LB&B in 1996. This cozy relationship has led to what we believe is a gross waste of taxpayer dollars.

In addition, as has been well documented in the press, LB&B's replacement workers have threatened the safe operation of Plum Island and the ferries transporting USDA employees between the island, Long Island and Connecticut. We share Senator Hillary Rodham Clinton's concerns about the lack of adequate background screening of these replacement workers. A recent story in the New York Times, regarding a replacement worker who had remote access via computer to the air handling equipment and yet had three arrests for assault, reinforces our anxiety about LB&B's performance and practices

This contractor is an extreme liability for the government. LB&B has wasted millions of dollars of taxpayer money to deny workers their rights under federal law and other basic human rights. For the striking employees of Plum Island, LB&B has exceeded all reasonable business practices in exercising its anti-worker initiative to reduce wages and health care benefits.

The IUOE is also concerned about a former government contracting official subsequently employed by LB&B. In 1996, LB&B was awarded the operations and maintenance contract for Plum Island. At the time, Harry Morgan was the Administrative Contracting Officer for the USDA at Plum Island. In December 1996, Mr. Morgan retired from the USDA. According to an article in LB&B's June 2002 company newsletter, "In January 1997, Mr. Harry Morgan joined the LB&B team at our corporate headquarters. For several of us, Harry was a long-time friend and associate before he joined the company." This appears to be in violation of federal policy.

LB&B Associates and USDA's Waste of Taxpayer Dollars

- * LB&B Associates began negotiations with IUOE Local 30 in July 2001 and could have settled this contract in October 2001 for an additional 40 cents per worker, per hour. These 40 cents would have been in addition to the 10 cents per hour that LB&B offered. LB&B expected the workers to accept a 10-cent per hour increase to cover health and welfare and pension cost increases.
- * The United States is experiencing the biggest health care cost increases in its' history while LB&B is offering to decrease the health care benefits for workers exposed to the deadliest diseases know to mankind.
- * It is estimated that USDA has spent well over \$2,000,000 to fund a strike caused by LB&B Associate's anti-worker attitude combined with bad business decisions.
- * It has cost the United States taxpayers \$1,900,00 more to operate and maintain the Plum Island Research Center because of LB&B' s intentional dispute with its' workers.
- * LB&B could have paid the 40 cents per hour, per employee, but elected to force a strike, which actually cost over \$26,666 per worker or \$12.82 per hour.
- * 40 cents per work hour equates to less than \$850.00 per worker annually. The total cost of increased benefits for all of the workers for a one-year period is \$62,400.
- * LB&B Associates, Inc. clearly is not a good example of fiduciary responsibility and one that should be debarred from doing business based on the expense of their management style.
- * LB&B has history of disregarding federal law and continues to do so now on a national basis.
- * The USDA is reimbursing LB&B at least an additional \$45,000 per week while the strike continues
- * LB&B has hired at least one former USDA contracting official

LB&B hired USDA's former administrative contracting officer for Plum Island, Harry Morgan, immediately after retirement. In 1996, LB&B was awarded the operations and maintenance contract for Plum Island. At the time, Mr. Morgan was the Administrative Contracting Officer for the USDA at Plum Island. In December 1996, Mr. Morgan retired from the USDA. According to an article in LB&B's June 2002 company newsletter, "In January 1997, Mr. Harry Morgan joined the LB&B team at our corporate headquarters. For several of us, Harry was a long-time friend and associate before he joined the company." This may be in violation of federal policy.

- * USDA has reimbursed LB&B for settlement costs of an arbitration between LB&B and IUOE Local 30

In 2000, after LB&B lost an arbitration of a grievance over two terminations that were filed by IUOE Local 30, LB&B agreed to settle and paid the terminated workers. The USDA reimbursed

LB&B \$89,896 for this settlement. We believe that such a cost should be paid by LB&B and not reimbursed by a government agency. If an agency will simply reimburse a contractor for the cost of violating a collective bargaining agreement, the contractor has little incentive to avoid committing additional collective bargaining agreement violations.

Similarly, the US Army has reimbursed LB&B for the cost of another arbitration between LB&B and the International Brotherhood of Electrical Workers Local 113 at Fort Carson, Colorado.

* A USDA contracting official has denied that USDA is excessively reimbursing LB&B for legal and labor relations costs

The current Plum Island administrative contracting officer, Dennis Foley, wrote a memorandum that seems to absolve LB&B of billing practices we have questioned. Issued in the context of our labor dispute with LB&B, we believe that the memorandum violates the neutrality of the USDA regarding negotiations between Local 30 and LB&B.

* USDA refuses to release information about LB&B's legal and labor relations cost reimbursements

We have reason to believe that the USDA reimburses LB&B's legal and labor relations costs in excessive amounts. These reimbursements effectively constitute using tax dollars to support breaking labor laws. So far, the USDA has refused to provide any documentation of reimbursements to LB&B for these costs. On March 4, 2002, the IUOE filed a request under the Freedom of Information Act for this information. Our request was denied. Senator Harkin also requested this information and to the best of our knowledge has not received it.

* USDA is violating our members' First Amendment rights

On April 17th, staff and members of IUOE Local 30 distributed leaflets at Plum Island questioning LB&B's billing practices. While the leaflets were being distributed, an IUOE staff member, Joe McLaughlin, received a telephone call from Teri Taylor, at the time the contracting officer for Plum Island. Ms. Taylor was extremely agitated. She told Joe that she wanted to know who was at Plum Island engaging in a "smear campaign" against LB&B, and that whomever it was needed to leave on the next boat out from the island or they would be thrown off the island. She demanded to know who was distributing leaflets. Joe told her that he knew someone was leafleting, if that's what she meant, and that he did not know who exactly it was or how to contact him or her. Taylor demanded that Joe give her IUOE Local 30 Business Manager Jack Ahern's cell phone or office phone number, because she wanted to find out who was leafleting, and tell Jack that they had to leave on the next boat. Joe gave Ms. Taylor Jack's office phone number. Ms. Taylor interfered with our staff and members' First Amendment rights. Her conduct violated the neutrality of the USDA regarding negotiations between Local 30 and LB&B.

After that incident, USDA barred union representatives from Plum Island, and has maintained that ban since April. Local 30 staff were not allowed to meet with IUOE members on Plum Island after April.

* USDA and LB&B are using the Small Business Administration's mentor-protégé program to avoid recompeting the Plum Island contract

According to the US Small Business Administration, LB&B is enrolled in the SBA section 8(a) set-aside contracting program until April 2004 as a woman-owned and Asian Pacific American-owned small business. Lily Liang Brandon is the president and majority owner of LB&B, with 91% of the shares. However, Lily's husband, Ed Brandon, LB&B's Chief Operating Officer, actually runs the business. Ed Brandon has a long history as an executive for large government contractors performing operations and maintenance contracts.

According to the SBA, LB&B has graduated from the 8(a) program and is now too large to bid on small business set-aside contracts. The Plum Island contract was awarded to LB&B as a set-aside in 1996. If the Plum Island contract were to be rebid as a set-aside LB&B would be ineligible to bid.

LB&B has found a way to get around this problem.

According to an article in LB&B's March 2002 company newsletter, LB&B has entered into a mentor-protégé agreement with Olgoonik Logistics LLC, an Alaskan Native village corporation. Alaskan Native corporations are eligible for small business set-asides and sole source contract awards regardless of their size. According to another article in the same newsletter issue, a representative of Olgoonik participated in at least one of LB&B's bi-monthly meetings with the USDA.

The USDA has awarded a sole-source, noncompetitive contract to a joint venture between Olgoonik and LB&B, North Fork Services for Plum Island operations and maintenance, effective on or about January 6, 2003. By law, Olgoonik must own at least 51% of the joint venture, and we believe LB&B owns the other 49%. The mentor-protégé agreement and joint venture appear to be a subterfuge by LB&B to continue receiving income from set-aside contracts, even though LB&B is now too large to receive set-aside contracts on its own. LB&B management will continue to manage the Plum Island contract with little substantial day-to-day control by Olgoonik.

Olgoonik may be a small business, but is not part of a "mom and pop" company. It is a subsidiary of Arctic Slope Regional Corporation, a private company with over 6,000 employees, over \$1 billion in revenue in 2001, and listed at number 271 on the Forbes magazine "Forbes Private 500" list of largest private companies.

* LB&B may be overcharging USDA for General and Administrative contract costs

LB&B also performs facilities operations and maintenance under a contract with the NASA Goddard Space Flight Center, in Greenbelt, Maryland. According to records received pursuant to a request under the Freedom of Information Act, as of March 2001, LB&B was charging NASA Goddard a general and administrative ("G&A") expense rate of 4.5 percent. As of July 2001, LB&B was charging the USDA Plum Island Animal Disease Center a G&A rate of 5.76 percent - 1.26 percent higher than that charged to NASA. Since LB&B's USDA and NASA contracts are multiple year, multimillion-dollar contracts, a 1.26 percent difference means that USDA paid over

fifty four thousand dollars more in G&A costs because of the higher rate charged. There seems no rational reason why USDA is paying a higher G&A rate than NASA.

When we publicized our concern over these differing G&A rates, Dennis Foley insisted we were wrong, and called us "lying snakes" in an e-mail sent to Joe McLaughlin, yet more evidence of USDA's lack of neutrality. According to USDA, undefined "administrative action" was taken against Mr. Foley after we brought this additional evidence of Mr. Foley's lack of objectivity with the USDA ethics office.

We believe that all of these points, taken into consideration, clearly show that the USDA contracting officials no longer have the ability to perform their duties in an objective and unbiased manner, and that the USDA has taken the side of LB&B in their attempt to trample the rights of our members and avoid reaching a fair collective bargaining agreement.

Wage and Hour and Labor Laws

In 1995, LB&B settled federal Wage and Hour violations by paying \$8,625.

In 1996, LB&B resolved another Wage and Hour case with a payment of \$58,228.

LB&B is currently under investigation by the US Department of Labor for allegations of violations of federal wage and hour laws and the Service Contract Act in New Jersey, Iowa and Georgia. Evidence suggests that LB&B has deliberately misclassified workers in order to pay lower wage rates in certain job categories. The IUOE has asked the U.S. Department of Labor to undertake a nationwide investigation of LB&B pay practices.

Silvia Cruz used to work for LB&B Associates at the IRS Service Center in Chamblee, Georgia as a janitor. LB&B is the operations and maintenance contractor at the center. Silvia was helping her co-workers fight to improve their working conditions. Then, LB&B fired Silvia.

On July 31st, Region 10 of the National Labor Relations Board in Atlanta, Georgia issued a Complaint and Notice of Hearing regarding charges filed by International Union of Operating Engineers Local 926 about Silvia's firing. According to the complaint, LB&B was "discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of.. the [National Labor Relations] Act."

A hearing before an NLRB administrative law judge was set for October. A few days before the hearing was to begin, LB&B paid Silvia \$10,000 to settle the complaint.

Ft. Carson and the IBEW

At Ft. Carson, Colorado, officials of IBEW Local 113, which represents some 175 LB&B contract personnel at that Army base, report that LB&B has amassed 331 terminations and numerous employee disciplines in violation of contractual grievance and arbitration procedures. The union

says that it is in various stages of defending at least five termination cases over the course of the past year. These cases include:

* A case in which the company has ignored legitimate orders from an arbitrator to reinstate and make whole an employee fired over allegations involving sexual harassment. The company has filed suit in federal district court to challenge the arbitrator's order for reinstatement and back pay. The judge's decision is pending.

* In another case at Ft. Carson, LB&B fired a member of the union negotiating committee, later agreeing to a monetary settlement in order to avoid an unfair labor practice hearing. In this case, LB&B made an unorthodox offer, which the union rejected -- to provide health care coverage under the contract if the union would drop the ULP.

* LB&B terminated another employee on charges of sleeping on the job during his lunch break. When the union won an arbitration decision to reinstate the employee, the company fired the same employee again. In this case, the National Labor Relations Board cited LB&B.

* An employee who was injured in an accident was fired under a company "policy" which stipulates dismissals for "second accidents". The only copy of the company "policy book" under which this policy is ostensibly promulgated is kept in a locked desk drawer and available only to the project manager. This incident is pending arbitration.

* Relations between the union and LB&B have been strained since the union won representation rights for the army base at Ft. Carson in August 1999. In January 2002, the company refused to permit employees to opt to shift a portion of individual annuity payments to cover an unexpected increase in health care premiums to avoid cancellation of employee health care coverage. Just 24 hours before the termination would have become effective, the company eventually withdrew its objections to the fund shift.

Fallon Naval Air Station and the IAM

The International Association of Machinists represents LB&B employees at Fallon Naval Air Station in Nevada. On July 19th, NLRB Region 32 in Oakland, California issued a Consolidated Complaint and Notice of Hearing on four separate unfair labor practice charges filed by the IAM. The NLRB charged that LB&B had refused to provide the union with information necessary for collective bargaining, had delayed scheduling collective bargaining sessions; refused to meet with the union for further negotiations; and fired a worker for joining or assisting the union and engaging in legally protected activity. A settlement agreement has been reached regarding some of these complaints. A trial was held on July 30th before an Administrative Law Judge over the illegal firing. Only after the Consolidated Complaint was issued ten months after bargaining began, did LB&B finally reach a collective bargaining agreement with the union and settlement of some of the NLRB charges.

Skilled Labor Shortages

The Government should be considering the current lack of skilled craftspeople. As part of the privatization process, government agencies are likely to encounter a lack of trained personnel, which is at its highest point in the last one hundred years. Finding and keeping qualified personnel will be more difficult than ever. Most of the newly privatized workers will be paid under Service Contract Act (SCA) area wage determination, which is often lower than what private industry pays. The infrastructure of government facilities will suffer.

The IUOE boasts a proud tradition of ensuring that its members receive training necessary and appropriate to the performance of their work. For over one hundred years the IUOE and its local unions have been involved in establishing, operating and administering a wide range of training programs and projects. This training historically has met and, in most cases, surpassed both craft and regulatory compliance objectives. Lack of product specific training could be a legitimate concern in any facility, but can only be addressed by providing in house personnel with more personalized training.

The proposed rule will be an open invitation to abuse, misuse and misapplication. The DoL already has extreme difficulty in enforcing current prevailing wage laws, and there are plenty of unscrupulous contractors who know this and take full advantage of it. Given the extremely limited resources the DoL currently has available for monitoring and enforcing the SCA, these proposed exemptions are likely to lead to substantial additional violations, intentional and unintentional, of the Act.

As with any rules, there are always loopholes. Loopholes in the SCA since its inception have plagued the government. One most notable one caused a complete replacement of workers just about every time the government changed contractors. The infrastructure of federal government facilities has suffered for decades under this loophole and has created an extremely large shortage of skilled workers with institutional knowledge to staff these facilities. Having a large turnover has kept wages and skills at an all time low as compared with the rest of the industry. This presents the skills shortage, which may exist within some government facilities, but IUOE members are the exception to this problem. Our members possess the highest level of skills in both public and private industry due to the IUOE commitment to education.

Sincerely,

Frank Hanley
General President