No. 01-664

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Pursuant to 28 U.S.C. 1491(b)(1) (Supp. V 1999), the Court of Federal Claims has jurisdiction in "an action by an interested party objecting to * * * any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The questions presented are:

1. Whether federal employees or their labor unions are "interested part[ies]" under 28 U.S.C. 1491(b)(1) and so can challenge an agency's cost-comparison decision that results in the contracting out of services formerly performed by agency employees to a private contractor.

2. Whether federal employees and their unions lack standing to challenge an agency's cost-comparison decision because they are not within the zone of interests protected by the procurement statutes that require cost comparison.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 258 F.3d 1294. The opinion of the Court of Federal Claims (Pet. App. 15a-44a) is reported at 46 Fed. Cl. 586.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2001. The petition for a writ of certiorari was filed on October 22, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the limits, imposed by Congress and long recognized by the courts, on who may

sue to challenge an agency's procurement-related decision to contract out certain activities to private sources as a way of saving taxpayer dollars. Before 1996, jurisdiction over procurement protests was divided between the Court of Federal Claims and federal district courts. The Court of Federal Claims had jurisdiction over *pre-award* procurement protests brought by disappointed bidders.[1] This jurisdiction was based on the Tucker Act, 28 U.S.C. 1491(a)(1), which authorizes the Court of Federal Claims to "render judgment upon any claim against the United States founded either upon * * * any express or implied contract," and was premised on the existence of an implied-in-fact contractual commitment by the government to evaluate the bids of qualified bidders on procurement contracts fairly and honestly. See *United States* v. *John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983); *Heyer Prods. Co.* v. *United States*, 135 Ct. Cl. 63 (1956).

In contrast, beginning with the D.C. Circuit's decision in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (1970), federal district courts exercised jurisdiction over certain *post-award* procurement protests under the Administrative Procedure Act (APA), 5 U.S.C. 702. Such *Scanwell* jurisdiction provides that "sufficiently viable runners-up in a procurement process have standing to allege that an illegality in the process caused the contract to go to someone else and not to them." *Free Air Corp.* v. *FCC*, 130 F.3d 447, 450 (D.C. Cir. 1997); see also *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 579 (D.C. Cir. 1975) (*Scanwell* held

[1] Prior to 1992, the Court of Federal Claims was the United States Claims Court; prior to 1982, the court's functions were performed by the United States Court of Claims. For simplicity, the court is referred to throughout as the Court of Federal Claims.

only "that a disappointed bidder on a government contract was a person aggrieved under the APA and had standing to seek a limited review of the contract award."), cert. denied, 423 U.S. 1048 (1976); Pet. App. 10a, 11a.

Scanwell jurisdiction is thus generally limited to qualified disappointed bidders. Of particular relevance to this case, the courts of appeals *uniformly* have held that government employees and their unions lack standing under *Scanwell* to challenge government procurement decisions. *E.g.*, *American Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d 460, 469-475 (7th Cir. 1999); *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d 1038, 1052-1054 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990); *American Fed'n of Gov't Employees* v. *Stetson*, 640 F.2d 642, 645-646 (5th Cir. 1981); *American Fed'n of Gov't Employees*, v. *Dunn*, 561 F.2d 1310, 1313 (9th Cir. 1977).

Against this backdrop, Congress passed the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, § 12, 110 Stat. 3874. This statute, which was enacted to resolve problems caused by the divided nature of procurement-protest jurisdiction, provides in part:

> Both the Unties [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action *by an interested party* objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the

> United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. 1491(b)(1) (Supp. V 1999) (emphasis added). The ADRA thus allowed both federal district courts and the Court of Federal Claims to hear "the full range of bid protest cases previously subject to review in either system." 142 Cong. Rec. 26,646 (1996) (statement of Sen. Levin). See Pet. App. 48a-51a.

The ADRA's grant of full and concurrent jurisdiction to the Court of Federal Claims and federal district courts, however, was temporary. To prevent forum shopping and to promote uniformity in government procurement law, Congress sought to channel all jurisdiction over government procurement protests to the Court of Federal Claims. Therefore, as part of the ADRA, Congress enacted a sunset provision that terminated federal district court jurisdiction over bid protests on January 1, 2001. ADRA § 12(d), 110 Stat. 3875; Pet. App. 50a. Consequently, the Court of Federal Claims now has exclusive jurisdiction under Section 1491(b)(1) to hear government procurement protests. *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1079-1080 (Fed. Cir. 2001).[2]

2. a. The procurement challenge in this case involves two government procurement statutes and Circular A-76 of the Office of Management and Budget (OMB). Pursuant to 10 U.S.C. 2462(a), the Department of Defense must procure the supplies and services it needs (except for those necessary for functions that the

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[2] The General Accounting Office (GAO), an Article I administrative forum, also reviews procurement protests, but such administrative review does not exclude judicial review under 28 U.S.C. 1491(b)(1) (Supp. V 1999). See 31 U.S.C. 3551 *et seq.*

Secretary of Defense "determines must be performed by military or Government personnel") from the private sector if a private contractor can provide them at a cost lower than the cost of providing them in-house with government personnel. In making these cost comparisons, the Secretary shall ensure that all costs considered are "realistic and fair." 10 U.S.C. 2462(b).

b. The Federal Activities Inventory Reform Act of 1998 (FAIR), Pub. L. No. 105-270, 112 Stat. 2382 (31 U.S.C. 501 note (Supp. V 1999)), requires all Executive Branch agencies to prepare an annual list of activities that they perform that are not "inherently governmental functions." FAIR § 2(a), 112 Stat. 2382. Using language identical to the cost-comparison provision in 10 U.S.C. 2462(b), FAIR provides that when an agency considers contracting with a private source to perform an activity on this list, it must select the source using a competitive process that includes a "realistic and fair" cost comparison. FAIR § 2(d) and (e), 112 Stat. 2383. It also provides that any "interested party," defined to include prospective contractors, employees of the agency that is an actual or prospective offeror to perform the activity, and their unions, can file an administrative challenge to the inclusion or omission of any activity from the annual list. FAIR § 3, 112 Stat. 2383. FAIR, however, makes no provision for challenging an agency's cost comparison. See Pet. App. 38a-40a.

c. OMB Circular A-76 (Pet. App. 54a-62a) is an internal Executive Branch directive from OMB to the heads of executive agencies. It sets forth "the general policy of the Government to rely on commercial sources to supply the products and services the Government needs." Circular para. 4(a); Pet. App. 54a. The Circular directs that, except for "functions [that] are inherently Governmental in nature," "the Government shall not

start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." Circular paras. 5(b) and (c); Pet. App. 55a. To determine whether an activity that could be performed by the private sector should be contracted out or retained in-house, an agency conducts a comprehensive cost comparison in accordance with the Circular and its Supplement. The activity must then be contracted out unless the cost comparison demonstrates that in-house performance by the government would be more economical than performance by the private sector. Circular paras. 5(a) and 8(d); Pet. App. 55a, 61a. The Circular also provides: "This Circular and its Supplement shall not * * * [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular," except for the administrative appeal provided by the Circular and by Section 3 of FAIR, which allows administrative challenges to the annual list required by that statute. Circular para. 7(c)(8); Pet. App. 58a, 59a.

3. In accord with 10 U.S.C. 2462(b), FAIR, and Circular A-76, the Defense Logistics Agency (DLA) undertook a cost comparison for material distribution services at the Defense Distribution Depot in Barstow, California. Pet. App. 17a, 19a. DLA first conducted a competitive acquisition among private sources and determined that EG&G Logistics, Inc. (EG&G) offered the best value among the seven private offerors. *Id.* at 17a-18a. Government management submitted its own proposal to perform the same work using government employees. *Id.* at 15a, 17a-18a.

Following receipt and amendment of the EG&G and in-house proposals, DLA compared their costs. It determined that EG&G's cost of $14,521,719 was approximately $2.5 million lower than the in-house cost of $17,032,459. Pet. App. 19a-20a. Accordingly, DLA decided to contract out the Barstow Depot operations to EG&G. *Id.* at 20a. DLA subsequently denied an administrative appeal of the cost comparison brought by Barstow Depot employees and their union, American Federation of Government Employees (AFGE). *Id.* at 20a-21a.

4. Petitioners, two DLA employees at the Barstow Depot and AFGE, filed this action in the Court of Federal Claims challenging DLA's decision to award the Barstow Depot contract to EG&G. Pet. App. 15a, 21a. Petitioners alleged that EG&G substantially underbid the work and that DLA failed to confirm EG&G's costs in violation of 10 U.S.C. 2462(b), FAIR, and OMB Circular A-76. Pet. App. 21a-22a. Petitioners sought to invoke the jurisdiction of the Court of Federal Claims under 28 U.S.C. 1491(b)(1) (Supp. V 1999), which limits the court's procurement-related jurisdiction to actions "by an interested party" to the agency's procurement decision.

The Court of Federal Claims dismissed petitioners' suit for lack of standing. Pet. App. 15a-44a. The court first concluded that its jurisdiction over procurement actions under 28 U.S.C. 1491(b)(1) (Supp. V 1999) was coextensive with that of district courts under the Administrative Procedure Act, 5 U.S.C. 702, so that any person who would have had standing to sue in district court is an "interested party" under Section 1491(b)(1). Pet. App. 32a. The court then held that petitioners, as potentially displaced federal workers and their union, lack standing because they are not

within the zone of interests of 10 U.S.C. 2462 or FAIR. Pet. App. 35a-44a. Although FAIR § 3, 112 Stat. 2383, includes agency employees and their unions as "interested part[ies]," the court noted that this Section is expressly limited to challenges to the initial inclusion or omission of agency activities on the annual list of activities that are appropriate for contracting-out. The court also observed that petitioners in this case do not challenge the inclusion decision, and that nothing in FAIR or its definition of interested parties provides for challenges to an agency's cost comparisons. Pet. App. 38a-39a. In light of this express limitation, the court held that "Congress did not intend for federal employees and their unions to be able to challenge cost comparisons." *Id.* at 39a.

The court also held that the legislative history of FAIR showed that its purpose is to provide the "best value to the American taxpayer," not "to support continued employment by federal workers." Pet. App. 40a (quoting 144 Cong. Rec. S9104 (daily ed. July 28, 1998) (statement of Sen. Thomas)). In addition, the court observed that courts have uniformly rejected the arguments of federal workers and their unions for standing under 10 U.S.C. 2462(b), which contains the same cost-comparison language as Section 2(a) of FAIR. Pet. App. 40a. Further, the court held that "[b]ecause OMB Circular A-76 is an executive order and not a statute or regulation, it does not by itself confer any rights to judicial review." *Id.* at 33a n.18.

5. The Federal Circuit affirmed the district court's dismissal for lack of standing on a different ground, holding that 28 U.S.C. 1491(b)(1)'s (Supp. V 1999) grant of jurisdiction to the Court of Federal Claims to hear procurement challenges brought by "interested part[ies]" includes only challenges brought by bidders

and prospective bidders on government procurement contracts. Pet. App. 1a-14a.

The court of appeals concluded that the text and legislative history of 28 U.S.C. 1491(b)(1) (Supp. V 1999) indicate that Congress intended to confer upon the Court of Federal Claims jurisdiction over post-award procurement protests to the same extent that federal district courts had previously exercised that jurisdiction under *Scanwell*. Pet. App. 10a. The court of appeals reasoned that (1) *Scanwell* jurisdiction generally had been limited to procurement challenges brought by qualified disappointed bidders, and had uniformly been held by the courts of appeals to preclude standing in procurement protests brought by government employees or their labor unions; (2) although Congress expressly adopted the APA's standard of review in another section of the ADRA, 28 U.S.C. 1491(b)(4) (Supp. V 1999) , it chose the term "interested party" to define standing under the ADRA, rather than invoke the APA's standing provision; (3) the term "interested party" is also used in a related procurement statute, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551 *et seq.*, which provides for administrative review of procurement challenges, and which explicitly defines "interested party" to include only "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract," 31 U.S.C. 3551(2) (1994 & Supp. V 1999); and (4) adopting a narrower definition of "interested party" is consistent with the principle that waivers of sovereign immunity, such as contained in 28 U.S.C. 1491(b)(1) (Supp. V 1999), are to be construed narrowly. See Pet. App. 9a-13a. Accordingly, the court of appeals held that "[b]ecause [petitioners] here are

not actual or prospective bidders or offerors, they do not have standing to challenge the DLA's cost comparison analysis or its decision to award the depot services contract to EG&G." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below is also consistent with the uniform decisions of the courts of appeals holding that federal employees and their unions are not within the zone of interests protected by the government contracting-out statutes. Accordingly, further review by this Court is unwarranted.

1. The court of appeals correctly held that petitioners are not "interested part[ies]" within the meaning of 28 U.S.C. 1491(b)(1) (Supp. V 1999). Section 1491(b)(1) confers jurisdiction on the Court of Federal Claims in "an action by an interested party objecting to * * * any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The statute, however, does not explicitly define "interested party."

Petitioners argue that potentially displaced employees and their unions are within the plain meaning of "interested party," and they cite a dictionary meaning of "interested" as "[h]aving an interest in something; concerned" or "[p]articipating; * * * having money involved." Pet. 8 n.8. Petitioners' proposed definition is potentially so broad as to encompass persons having only a generalized, academic curiosity about a government contract or an indirect financial interest, such as owning shares in a potential bidder. The court below, in contrast, looked to accepted aides to statutory con-

struction to determine the meaning of "interested party" in Section 1491(b)(1).

As the court of appeals stated, Section 1491(b)(1) was intended to confer upon the Court of Federal Claims post-award procurement-protest jurisdiction previously exercised by the district courts under *Scanwell*. Pet. App. 9a-10a (quoting 142 Cong. Rec. 26,645 (1996) (statement of Sen. Cohen), and H.R. Conf. Rep. No. 841, 104th Cong., 2d Sess. 10 (1996)). Contrary to petitioners' contention, moreover, *Scanwell* and its progeny allowed suits brought by qualified disappointed bidders to challenge the award of a government contract, but *uniformly* held that displaced federal workers and their unions lack standing to challenge an agency's contracting-out procurement decisions. *E.g.*, *American Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d at 469-475; *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d at 1052-1054; *American Fed'n of Gov't Employees* v. *Stetson*, 640 F.2d at 645-646; *American Fed'n of Gov't Employees* v. *Dunn*, 561 F.2d at 1313.[3]

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[3] Petitioners' reliance (Pet. 14) on *Cohen*, 171 F.3d at 469-475, is misplaced. In *Cohen*, the Seventh Circuit held that displaced federal workers and their unions are *not* within the zone of interests protected by the general procurement statutes. *Id.* at 469-474. The court, however, concluded that federal employees and their unions are within the zone of interest of the Arsenal Act, 10 U.S.C. 4532, a specific statutory provision that is not applicable in this case and that petitioners do not seek to invoke. The Seventh Circuit based its standing decision on the fact that unlike most procurement statutes, which focus on saving taxpayer dollars and are antithetical to federal employees' interests in job security, the Arsenal Act "appears to be aimed at preserving the government's in-house military production capabilities." 171 F.3d at 473. Similarly, petitioners' reliance (Pet. 10 n.9, 16, 17 n.20) on the unreported district court decision in *Diebold* v. *United States*, Civ. Action No. C90-0001-L(A) (W.D. Ky. Apr. 2, 1993) (reproduced at

Moreover, those court of appeals decisions rejecting procurement-protest standing for federal employees and their unions are fully consistent with this Court's decision in *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517 (1991), which held that unions representing postal employees lack standing to challenge a rule allowing private courier companies to engage in international remailing because the unions and the employees are not within the zone of interests of the Private Express Statutes, 18 U.S.C. 1693 *et seq.* and 39 U.S.C. 601 *et seq.*

In addition, the court of appeals properly construed "interested party" in Section 1491(b)(1) in accord with the definition of that same term in a related government procurement statute. Pet. App. 13a; see *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (using meaning of "official detention" in related sentencing provisions and the Bail Reform Act of 1984 to aid interpretation of same term in 18 U.S.C. 3585(b), noting same term "should bear the same meaning" in "related" statutes); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943) (using Federal Employers' Liability Act to aid interpretation of Fair Labor Standards Act of 1938). The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551 *et seq.*, which governs administrative review of certain procurement protests, defines "interested party" as "an actual or prospective bidder or offeror whose direct

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Pet. App. 63a-73a), is unavailing. In amending Section 1491(b)(1), Congress is presumed to have acted on the basis of the reported court of appeals decisions cited above, not on an unreported, interlocutory district court decision. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. 3551(2) (1994 & Supp. V 1999). Petitioners are not included in this definition.

The court of appeals' interpretation of "interested party" is further confirmed by the fact that, in enacting the ADRA, "Congress did not explicitly invoke the APA standing requirements, although it did explicitly invoke the APA standard of review." Pet. App. 13a (quoting 28 U.S.C. 1491(b)(4) (Supp. V 1999), which provides: "In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5"). The ADRA's standard of review provision demonstrates that Congress knew how to incorporate APA standards into the ADRA when it so desired. That Congress made no such incorporation with regard to the APA's standing provision, and instead adopted the narrower "interested party" standard used in the CICA, strongly supports the court of appeals' interpretation. Cf. *Lindh* v. *Murphy*, 521 U.S. 320, 327-331 (1997).

2. Moreover, even if petitioners were held to be "interested part[ies]" so as to establish jurisdiction under Section 1491(b)(1), they would still lack standing to challenge the DLA's cost comparison. As the Court of Federal Claims held (Pet. App. 35a-44a), potentially displaced federal employees and their unions are not within the zone of interests protected by the statutes

upon which petitioners rely. Petitioners invoke 10 U.S.C. 2462 and FAIR. See Pet. App. 21a.[4] Section 2462 directs the Department of Defense to obtain its goods and services from the private sector if a private contractor can provide them at a cost below the cost of providing them in-house, except where the Secretary of Defense determines that the goods and services must be provided by government personnel. FAIR requires all agencies to select a source for the activities they perform (other than inherently governmental functions) using a competitive process employing a "realistic and fair" cost comparison. FAIR § 2(d), 112 Stat. 2383.

The Court of Federal Claims correctly held that these statutes were enacted to provide the "best value to the American taxpayer," not to promote continued federal employment, a purpose that could frequently prove antithetical to the purposes of the cost-comparison provisions. See Pet. App. 40a. As both courts below correctly noted, and as explained above, the courts of appeals are uniform in holding that federal employees and their unions are not within the zone of interests protected by 10 U.S.C. 2462(b) or other general procurement statutes. Pet. App. 10a-12a, 40a-43a.

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[4] Petitioners do not claim standing based upon OMB Circular A-76. Pet. App. 33a n.18. To have standing, a plaintiff must be arguably within the zone of interests of a relevant statute or constitutional guarantee. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). Executive orders, such as the Circular A-76, cannot confer judicial standing. *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d at 1043.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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