

In the United States Court of Federal Claims

No. 04-252C

Filed May 11, 2004

To Be Published

NAPLESYACHT.COM, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Jeffrey Isaac Gdanski, Scott Howard Gdanski, Gdanski & Gdanski, Teaneck, New Jersey, for plaintiff.

Claudia Burke, United States Department of Justice, Washington, D.C., for defendant.

Andre Long, Associate Counsel, Naval Air Warfare Center, Weapons Division.

ORDER DENYING MOTION FOR PARTIAL RECONSIDERATION

BRADEN, Judge

On April 26, 2004, the court issued a Memorandum Opinion and Final Judgment denying: plaintiff's February 26, 2004 Motion for a Preliminary Injunction; and defendant's ("Government") March 12, 2004 Motion for Judgment Upon the Agency Record. The court also granted-in-part and denied-in-part plaintiff's March 12, 2004 Cross-Motion for Judgment Upon the Administrative Record. In addition, plaintiff also was afforded the opportunity to move for bid preparation and proposal costs, as well as other costs and attorneys fees and expenses.

On April 27, 2004, the Government moved for partial reconsideration regarding the following language in the court's April 26, 2004 Memorandum Opinion and Final Judgment:

in the event that the Navy decides to issue a Solicitation for additional FACT Navy target boats in the future, plaintiff and the other offerors for Contract No. N68936-03-R-0097 will be notified of such Solicitation and be offered a timely opportunity to submit a proposal and offer. The Navy will not afford either American Marine,

Maximum Thunder, nor any entity with which either company has or has had an economic or business relationship, and [sic] preference or advantage for having been selected under Contract No. N68936-03-R-0097. In the event that plaintiff or any other offeror under Contract No. N68936-03-R-0097 files a bid protest or action regarding any such future contract regarding FACT target boats in the United States Court of Federal Claims, the case should be filed pursuant to RCFC 40.2 and the Clerk of the Court be informed of the same.

Gov't Mot. to Reconsider at 2 (quoting *Naplesyacht.com, Inc. v. United States*, 2004 WL 905412, *17 (Fed. Cl. April 26, 2004).

The Government argues that the aforementioned language is an “advisory opinion” and “inconsistent with RCFC 40.2” and therefore in issuing the April 26, 2004 Memorandum Opinion and Final Judgment there has been a “manifest error of law.” *Id.* at 3-9.

1. The April 26, 2004 Memorandum Opinion And Final Judgment Contains No Language That Would Be Constituted As An Advisory Opinion.

It is well established that the court does not have jurisdiction to “render advisory opinions.” *Fina Oil & Chemical Co. v. Ewen*, 123 F.3d 1466, 1470 (Fed. Cir. 1997). The constitutional offense to advisory opinions is founded in the requirement of Article III that a case or controversy must exist before the court exercises jurisdiction. On one hand, the Government has represented that the Navy has no present intent to solicit contracts for additional FACT target boats; on the other hand, the Government asserts that “the Court cannot judge contracting officer actions that they have yet to occur. And because the Court is limited to review of an actual agency decision, it cannot anticipate and control future agency decisions that have yet to be made.” Gov't Mot. to Reconsider at 7.

The final judgment language offensive to the Government, however, does not address the merits of any future FACT contracts for which the Navy may solicit offers and most certainly is not an advisory opinion. It simply requires the Navy to notify the offerors for Contract No. N68936-03-R-0097, in the event circumstances change. Moreover, it requires the Navy not to grant any preference or advantage to American Marine, Maximum Thunder, or any entity with which either company has or has had an economic or business relationship in awarding any future contracts for FACT target boats, because the Government represented to the court that this is the Navy's policy.

MS. BURKE: The government takes very seriously the idea that incumbents have no preference in the process. The government takes very seriously that new contractors should be afforded an opportunity to compete, which is precisely why the language in the past performance section exists. Even if you have done nothing before, we don't take off points for it. There is nothing in the record or anywhere else that indicates the government has any intention to favor Maximum Thunder and

American Marine if it chooses to have a new solicitation for a similar item. Nothing at all except the affidavit that the Plaintiff has submitted[.]

March 18, 2004 Hearing Transcript (“TR-II”) at 57-58.

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MS. BURKE: I’m also reminded by my co-counsel that the Competition in Contracting Act, which is referred as CICA, does not allow the agency to limit contracting to people who have previously been awarded a contract.

THE COURT: It’s not limiting, it’s a matter of some type of preference that’s included in the factors, relevant experience and past performance. They will have relevant experience and past performance now which they didn’t have before.

MS. BURKE: That’s correct. Well, they’ll have relevant experience. Past performance, again, doesn’t necessarily have to be limited to the government.

THE COURT: Well, presumably they will do a good job and won’t be disbarred.

MS. BURKE: We hope so.

THE COURT: So you’re saying the government would . . . entertain some kind of language in some way, language to be sure that everybody is on an equal footing here going into the next bid round, if and when that happens?

MR. LONG: Are you addressing me now, ma’am?

THE COURT: Yes.

MR. LONG: Ma’am, we would have no problem with that whatsoever because that is the truth, that nobody is being excluded from future competition, we have nothing planned and any verbiage to that effect we would have no problem whatsoever.

TR-II at 60-61

The court has the power under 28 U.S.C. § 1491(b)(1) and (2) in a post award bid protest case to “award any relief that the court considers proper[.]” The court has done that and declined to exercise its injunctive authority, in substantial part, because of representations made by the Government to the effect that plaintiff, and other similarly situated offerors, will have an opportunity to have an offer on a future FACT boat procurements considered fairly, which did not occur regarding Contract N68936-83-R-0097. *See Naplesyacht.com*, 2004 WL 905412, at *15-16.

2. The April 26, 2004 Memorandum Opinion And Final Judgment Complies With The Requirements Of RCFC 40.2 Regarding “Related Cases.”

RCFC 40.2 defines a “related case” as follows:

Cases are deemed directly related when an earlier filed case and the action being filed: (A) involve the same parties and are based on the same or similar claims; or (B) involve the same contract, property, or patent.

The purpose of RCFC 40.2 is two-fold. First, to ensure consistent application of the law to cases that involve similar legal issues. Second, to make the best use of judicial resources by maximizing the efficiencies achieved by having a judge knowledgeable about transactions with similar issues of fact and/or similar parties preside over subsequent like-kind cases. If the Navy solicits offers for other FACT target boats in the future and if a bid protest is lodged in the United States Court of Federal Claims challenging the Navy's solicitation or award of a contract for FACT target boats that action, as a matter of law, that bid protest will be "based on the same or similar claims" and therefore will be related to this case. *See* RCFC 40.2.

CONCLUSION

For the foregoing reasons, the Government's April 27, 2004 Motion for Partial Reconsideration of the April 14, 2004 Memorandum Opinion and Final Judgment is denied.

Both parties will assume their own costs.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge