In the United States Court of Federal Claims

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TRANSATLANTIC LINES LLC,	*	
Plaintiff,	*	No. 05-866C
v.	*	Filed: June 2, 2006
UNITED STATES OF AMERICA,	*	
Defendant,	*	
and	*	
STRONG VESSEL OPERATORS, LLC,	*	
Intervenor.	*	
* * * * * * *		

ORDER AND OPINION

This is an action for award of attorney's fees pursuant to the Equal Access to Justice Act. See 28 U.S.C. § 2412. Plaintiff petitioned the court for an injunction prohibiting the United States from issuing a proposed contract to the intervenor in this case, Strong Vessel Operators, LLC. We granted plaintiff's request for an injunction and encouraged the parties to resolve the remaining issues.

Plaintiff is the prevailing party in this litigation, but the Government argues that an award of attorney's fees would be inappropriate because its position was "substantially justified." We find that the Agency's actions in this procurement were not substantially justified, however. Plaintiff is entitled to reasonable attorney's fees and costs.

BACKGROUND

This was a post-award bid protest. Plaintiff TransAtlantic was the incumbent contractor, having entered a contract with the Department of the Army to transport cargo between Florida and Guantanamo Bay beginning in 2002. The Government awarded the new contract to Strong Vessel Operators. Plaintiff disputed the award in this court because of alleged violations of procurement statutes and regulations. We granted Strong Vessel's motion to intervene.

The record established that TransAtlantic's proposal was technically superior to Strong Vessel's, yet the contracting officer awarded the contract to Strong Vessel. We found that the CO gave Strong Vessel a competitive advantage over TransAtlantic.[1] We granted plaintiff's petition to enjoin defendant from awarding this contract to intervenor Strong Vessel and urged the parties to meet with the court and discuss appropriate remedies or other means of resolving the case.

A.

The Equal Access to Justice Act authorizes the award of attorney's fees and other expenses to eligible individuals and entities who are parties to proceedings before this court. A corporation is eligible for fees and costs under EAJA if it has prevailed in litigation against the United States and the Government cannot show that its position was "substantially justified." See 28 U.S.C. § 2412. Corporations and other business associations may not have more than five hundred employees or a net worth of more than $7 million. Id. The parties do not dispute that plaintiff is the prevailing party or that it qualifies for compensation pursuant to the Equal Access to Justice Act. The only issue is whether defendant's actions were substantially justified.

B.

The issues that we addressed in connection with plaintiff's petition for an injunction were (1) whether the contracting officer made a reasonable effort to insure that Strong Vessel's refrigerated cargo containers would meet the standards called for in the solicitation; and (2) whether the Agency allowed Strong Vessel to avoid Small Business Administration regulations governing limitations on labor costs. We found that the contracting officer did not make a reasonable inquiry to insure that Strong Vessel's refrigerated cargo containers met the Government's needs and that he did not enforce statutes and regulations applicable to small business concerns. The Agency's position cannot be considered reasonable or justified for as contemplated by EAJA for reasons stated in the Opinion. See TransAtlantic, 68 Fed. Cl. at 48.

C.

The Government must prove its position was substantially justified. Doty v. United States, 71 F.3d 384, 385 (Fed. Cir. 1995). This means the Government must show that its position was "justified to a degree that could satisfy a reasonable person." Larsen v. United States, 39 Fed. Cl. 162, 167 (1997) (quoting Commissioner, INS v. Jean, 496 U.S. 154, 159 (1999) and Pierce v. Underwood, 487 U.S. 552, 565-66 (1988)). The inquiry encompasses both an agency's pre-litigation conduct and the subsequent litigation by the Justice Department in this court. Doty, 71 F.3d at 386 (citing Gavette v. Office of Pers. Mgmt., 808 F.2d 1456, 1467 (Fed. Cir. 1986) (en banc)). We must "look at the entirety of the government's conduct and make a

[1] Factual details supporting the court's ruling may be found at TransAtlantic v. United States, 68 Fed. Cl. 48 (2005).

judgment call whether the government's overall position had a reasonable basis both in law and fact" to decide whether defendant's position is substantially justified. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991).

The court's ruling on the merits does not require a certain result on the issue of whether the Government's position is substantially justified. In fact, the Supreme Court has cautioned against such a determination. See Scarborough v. Principi, 541 U.S. 401, 415 (2004). Defendant may have "a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." Pierce, 487 U.S. at 569. Regardless, the issues are connected. Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 837 F.2d 465, 467 (Fed. Cir. 1988).

Defendant's argument in support of its litigation position and underlying agency actions is that the Government Accounting Office had ruled against plaintiff on the same facts. We noted in the Opinion, however, that the GAO's ruling was based primarily on its requirement that "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening . . . shall be filed prior to bid opening . . . . " TransAtlantic, 68 Fed. Cl. at 52 (citing 4 C.F.R. § 21.2(a)(1)). Thus, GAO prohibits a protestor from raising an issue that was apparent on the face of the solicitation before contract award.

The GAO rule is not binding on this court, or even on the GAO itself.[2] See TransAtlantic, 68 Fed. Cl. at 52. Moreover, "[a] GAO rule that self-limits that Agency's advisory role [cannot] constitute[] a limit . . . on this court's exercise of jurisdiction. [The Tucker Act] explicitly provides that this court shall have bid protest jurisdiction 'without regard to whether suit is instituted before or after the contract is awarded.'" Id. (quoting Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533, 535 (2003)).

The solicitation emphasized that the winning contractor's refrigeration unit must be self-sustaining. The purpose of this requirement was to insure the safety of perishable items en route were the barge to lose power at sea. According to defendant, the contracting officer reasonably believed that the cooling system proposed by Strong Vessel would meet this solicitation requirement. We found that the "underslung genset" proposed by Strong Vessel could not satisfy this requirement. Defendant argues that this was merely a factual finding with which defendant does not agree. That capability was crucial to this procurement, however. It was important to the Agency that the equipment maintain its refrigerating capacity if power on the barge failed during the voyage. If the contracting officer understood the need for this requirement, he could not have believed that the system proposed by Strong Vessel would qualify.

We concluded in the Opinion that "[t]he contracting officer's apparent willingness to relax contract requirements for the winning offeror was 'a significant, prejudicial error in the

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[2] The GAO "for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest." 4 C.F.R. § 21.2(c).

procurement process.'" Transatlantic 68 Fed. Cl. at 57 (citing Chapman Law Firm, 63 Fed. Cl. 519, 529 (2005). We noted that "the contracting officer gave Strong Vessel a competitive advantage over Transatlantic. Strong Vessel did not propose the [type of] generators that must be used to guarantee that the refrigeration units would be self-sustaining." Id.

CONCLUSION

Department of Justice attorneys are expected to raise the best defenses possible on behalf of the United States. Thus, whether the Government's position is substantially justified, for purposes of EAJA, is measured not only by reasonableness of the Government's legal arguments but also by the underlying agency conduct being challenged. See 28 U.S.C. § 2412(d)(2)(D) ("'Position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based . . . ."). It was apparent from arguments during the hearing on plaintiff's request for an injunction that the Government had few substantive arguments to offer, given the facts and law available to it.

Plaintiff has established that it meets the requirements of eligibility for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act. Defendant has not met its burden of proving that the Government's actions in connection with this procurement were substantially justified. TransAtlantic's application for fees and expenses under EAJA is therefore GRANTED.

Defendant has not objected to the amount of TransAtlantic's claim for costs and fees. Our review of plaintiff's supporting documentation has not disclosed obvious errors or misstatements. We assume that plaintiff's calculations are correct as stated. The Clerk will enter judgment for TransAtlantic Lines, LLC in the amount of $31,963.51.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge