

In the United States Court of Federal Claims

No. 05-711C

(Filed: July 8, 2005)

)
ASIA PACIFIC AIRLINES,)
)
Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant.)
)

OPINION AND ORDER

This pre-award bid protest case, filed July 1, 2005, concerns contracts to be awarded by the United States Postal Service (“USPS”) for the transportation by air of mail among the Hawaiian Islands. Nine separate “lanes” for the air transport of mail to and from destinations in the Islands are involved in the solicitation. Plaintiff Asia Pacific Airlines (“Asia Pacific”) has applied for a temporary restraining order barring the USPS from awarding contracts for transport of mail by air on any of the nine lanes, pending resolution of the proceedings in this case. The court held a hearing on this application beginning at 3:00 p.m. on July 1, 2005, the same day the complaint and the application were filed. At the hearing, the government represented that it was endeavoring to obviate the need for issuance of a temporary restraining order or preliminary injunction to maintain the *status quo*. It had extended the contract with the existing carrier until July 11, 2005, and was trying to extend the contract with the existing carrier through final judgment in this case but had been unable to do so prior to the hearing.

Subsequently, on July 5, 2005, the government filed a motion for leave to file a status report, which report attached a declaration stating that “the USPS can and will delay the award of any contracts placed at issue in the above-captioned bid protest pending a final decision on the merits.” Def.’s Status Report, attachment (Decl. of Leslie A. Griffith ¶ 5 (July 5, 2005)). In the circumstances, a temporary restraining order will not now be issued. Rather, for the reasons set forth below, Asia Pacific’s application for a temporary restraining order shall be subsumed into its motion for a preliminary injunction, and the hearing on the motion for a preliminary injunction will be consolidated with the evidentiary hearing on the merits of the case.

BACKGROUND

On April 26, 2005, USPS issued Solicitation 5AAIMT-05-A-3002, seeking bids for the air line haul transport of mail via nine routes, or lanes, in Hawaii. Joint Submission at ¶ 1.1.¹ The bidding process basically involved two steps. The first step required bidders to submit all of the information required in the solicitation, after which USPS would determine whether each bidder was eligible and whether each particular bidder's proposed schedule, past performance, and capability were acceptable. *Id.* ¶ 2.2. Once such a determination was made, a computer-based Competitive Bidding Event would provide "the [final] determining factor leading to the award of one or more contracts," *i.e.*, price. *Id.* ¶ 2.2.2.² Offerors could bid on a lane-by-lane basis or on a combined basis, and contracts for each lane would be awarded "to the supplier(s) whose pricing, past performance, and capability conform to the solicitation evaluation factors and is deemed to offer the Postal Service the best value." *Id.* ¶ 2.2.7. The solicitation set out a proposed schedule of flights as Attachment A, and stated both that "[t]he aircraft must operate according to the schedule published within the Service Schedule (Attachment A)," *id.* ¶ 1.2, but also that "[p]roposals that offer multiple flights to accommodate the necessary capacity may be accepted, but they will be of lesser value to the Postal Service than those that can transport the necessary volume with fewer flights." *Id.* ¶ 2.2.4.

Asia Pacific submitted its initial bid on May 18, 2005 for two of the nine lanes, the Honolulu-Maui route and the Honolulu-Hilo lane. Compl. ¶ 10. Although the schedule attached to the solicitation listed four departure times, with four daily tender and delivery times for weekdays on these two lanes, Asia Pacific's submission used one aircraft to carry mail along the two lanes. *Id.* ¶¶ 30, 32. At the first stage of the procurement, USPS put forward two objections to Asia Pacific's submission, namely, its inclusion of a volume-guarantee requirement and a fuel surcharge. Asia Pacific agreed to remove these items from its submission. *Id.* ¶ 11. USPS did not object to Asia Pacific's proposed use of one aircraft to serve both lanes. At that juncture, USPS found Asia Pacific's proposal to be acceptable and invited it to participate in the computer-based Competitive Bidding Event. *Id.*

The auction was conducted on May 27, 2005, and Asia Pacific was the apparent successful bidder for the two lanes on which it placed bids. *Id.* ¶ 12. A technical problem, however, adversely affected the final minutes of the bidding for the Kailua-Kona lane, resulting in the leading bid for that lane not being properly recorded. *Id.* ¶ 13. As a result, on June 1, 2005, USPS announced that it would reopen the bidding process for all nine lanes. *Id.* ¶ 15. In the new auction, Asia Pacific again was the successful bidder on the two lanes in which it was interested. *Id.* ¶ 20. However, on June 7, 2005, a representative of the USPS questioned whether Asia Pacific's bid was acceptable because of its use of only one aircraft. *Id.* ¶ 22. Asia Pacific

¹On July 1, 2005, the parties provided the court with the solicitation at issue.

²USPS retained the right, at its option, to "conduct discussions with one or more offerors having standing in the procurement" after the Competitive Bidding Event. *Id.* ¶ 2.2.

thereafter offered USPS two possible compromises, each of which USPS rejected, and on June 21, 2005, USPS declined to negotiate any further. Compl., attach. 4 (Letter from Patricia Jordan, Contracting Officer, USPS, to Mike Quinn, President, Asia Pacific Airlines (June 21, 2005)). At that time, USPS's Contracting Officer indicated that USPS was considering how to proceed on the two lanes on which Asia Pacific had bid, that USPS might decide to "resolicit for that service," and that Asia Pacific would be included in any such re-solicitation. *Id.* at 3.

On July 1, 2005, Asia Pacific filed suit in this court and with its complaint filed an application for a temporary restraining order and a motion for a preliminary injunction. By the application and motion for temporary equitable relief, Asia Pacific seeks to enjoin the USPS or its representatives from awarding contracts on any of the nine lanes pending final judgment in this case. Prior to filing this complaint, Asia Pacific had provided notice of its intended filing to the government pursuant to the Rules of the Court of Federal Claims ("RCFC"), Appendix C, ¶ 2. At the hearing on the application for a temporary restraining order held on July 1, 2005, the parties represented that they had reached a tentative agreement, whereby the USPS would not award any contracts on this project until July 11, 2005. The government also advised that it would make a further effort to secure interim air transport of mail. On July 5, 2005, the government filed a motion for leave to file a status report, which report included a declaration from Leslie A. Griffith, the Manager of Air Transportation Category Management Center of the USPS that "the USPS can and will delay the award of any contracts placed at issue in the above captioned bid protest pending a final decision on the merits." Decl. of Griffith ¶ 5.

ANALYSIS

RCFC 65(b) governs the issuance of temporary restraining orders, and it applies absent adequate notice to the adverse party or a hearing. The traditional 10-day limitation on the applicability of temporary restraining orders restricts the judiciary from enjoining conduct for extended periods of time without providing the adverse party the opportunity to present its side of the dispute. *See* RCFC 65(b) ("Every temporary restraining order granted *without notice* shall . . . expire by its terms within such time after entry, not to exceed 10 days, as the court fixes . . .") (emphasis added). By contrast, RCFC 65(a)(1) requires notice to the adverse party prior to issuance of a preliminary injunction. To constitute adequate notice under Rule 65(a) of the Federal Rules of Civil Procedure, a hearing must be held "in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 433 n.7 (1974).³ Without such notice, Rule 65(b) is applicable. *Id.* *See also* RCFC 65(b) ("[W]hen the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction. . . .").

³RCFC 65(a) and (b) are virtually identical to Fed. R. Civ. P. 65(a) and (b), except that the preservation of rights to trial by jury in the latter is not present in the former.

When the adverse party has received adequate notice and a hearing has been held prior to the issuance of a temporary restraining order, the court follows the same procedures as it would when considering a motion for a preliminary injunction. *See Kansas Hosp. Ass'n v. Whiteman*, 85 F.Supp. 1548, 1551 (D. Kan. 1993) (treating application for a temporary restraining order as a motion for a preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2951 (2d ed. 1995) (“Indeed, even if a court denominates an order as a ‘temporary restraining order’ [when notice is provided,] Rule 65(b) may not apply and, if there is an adversary hearing or the order is entered for an indeterminate length of time, the ‘temporary restraining order’ may be treated as a preliminary injunction.”). Accordingly, in such cases, courts treat the application for a temporary restraining order as a motion for a preliminary injunction both with regard to the duration of such an order and the jurisdiction of appellate courts to review an appeal on order entered after notice or with indefinite duration. *See Sampson v. Murray*, 415 U.S. 61, 86-87 (1974); *Baker Elec. Coop, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994).

The government received advanced notice of the filing of this bid protest case pursuant to RCFC Appendix C, ¶ 2.⁴ Thus, even though the hearing on the application for a temporary restraining order was held on the same day that the complaint was filed, counsel for the government had an opportunity to prepare for the hearing and appeared at the hearing to present the government’s response to the application. Thus, the provisions of RCFC 65(b) are inapplicable to the plaintiff’s application for a temporary restraining order. Accordingly, Asia Pacific’s application for a temporary restraining order shall be subsumed into its motion for a preliminary injunction.

In this case, there is no need to act now on the motion for a preliminary injunction because the government has agreed to maintain the *status quo* until a decision is rendered on the merits. Also, RCFC 65(a)(2) permits the court to “order the trial of the action on the merits to be advanced and consolidated with the hearing of the application [for a preliminary injunction].” The parties have agreed on a very expeditious schedule for supplying the administrative record of the procurement and for briefing the parties’ positions, culminating in a hearing on the merits set for August 3, 2005. *See* Scheduling Order issued July 5, 2005. At that hearing, the parties have been directed to adduce evidence related to the equitable factors bearing on injunctive relief, in addition to presenting their arguments on the issues that arise with the procurement. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004) (citing *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987)). This arrangement allows the parties to develop a comprehensive factual record and enables the court to conduct its proceedings efficiently and expeditiously.

⁴There is some dispute about how much notice is required before converting an application for a temporary restraining order into a motion for a preliminary injunction. The Supreme Court has held that same-day notice is inadequate notice under Fed. R. Civ. P. 65(a). *See Granny Goose Foods*, 415 U.S. at 433 n.7. The Fourth Circuit has held that two days notice is sufficient in some situations. *Ciena Corp. v. Jarrard*, 203 F.3d 312, 318-20 (4th Cir. 2000).

CONCLUSION

For good cause shown, Defendant's Unopposed Motion for Leave to File a Status Report, filed on July 5, 2005, is GRANTED. Defendant's Status Report shall be filed as of July 8, 2005. Asia Pacific's application for a temporary restraining order is subsumed into its motion for a preliminary injunction, the hearing on which is consolidated with the hearing on the merits of the case, pursuant to RCFC 65(a)(2).

It is so ORDERED.

Charles F. Lettow
Judge