

Note: This disposition is nonprecedential.

## United States Court of Appeals for the Federal Circuit

2007-5022

TESORO HAWAII CORPORATION,  
and TESORO ALASKA COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

J. Keith Burt, Mayer Brown LLP, of Washington, DC, for plaintiffs-appellants. With him on the brief were Cameron S. Hamrick, Michael E. Lackey, and Adrian L. Steel, Jr.

Steven J. Gillingham, Assistant Director, Commercial Litigation Branch, Classification Unit, United States Department of Justice, of Washington, DC, for the defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Jeanne E. Davidson, Director. Of counsel on the brief were Howard M. Kaufer, Assistant Counsel, Office of Counsel, Defense Energy Support Center, Fort Belvoir, Virginia, and Donald S. Tracy, Trial Attorney, Defense Supply Center Richmond, Richmond, Virginia.

Appeal from: United States Court of Federal Claims

Senior Judge Eric G. Bruggink.

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DECIDED: September 28, 2007

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Before MAYER and PROST, Circuit Judges, and LINARES, District Judge.\*

PROST, Circuit Judge.

Tesoro Hawaii Corporation and Tesoro Alaska Company (collectively “Tesoro”) appeal a decision of the United States Court of Federal Claims dismissing Tesoro’s claims against the United States. Tesoro Haw. Corp. v. United States, No. 02-704C (Fed. Cl. Oct. 3, 2006). Based on our disposition of nearly identical claims by other parties, we affirm the dismissal of claims relating to the price adjustment clause, but

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\* Honorable Jose L. Linares, District Judge, United States District Court for the District of New Jersey, sitting by designation.

reverse dismissal and remand claims relating to the government's small business and minority set-aside programs.

As this court held in ConocoPhillips v. United States, No. 2007-5004, 2007 WL 2741200 (Fed. Cir. Sept. 21, 2007), the parties' use of the Petroleum Marketing Monthly ("PMM") did not violate regulations or contract provisions. Specifically, PMM accurately reflected market price as conceived by the contract, the use of PMM was not a mistake by either party, and the government did not breach the contract by failing to pay fair market value for the fuel Tesoro supplied. Further, use of PMM was consistent with the governing regulations.

Contrary to the disposition by the Court of Federal Claims, however, that court does have jurisdiction over Tesoro's claims that the government's program preferring minority suppliers violates the Equal Protection Clause of the Fifth Amendment. Because the minority preference program allegedly affected the contract price, the Court of Federal Claims must consider the merits of Tesoro's claims.

Accordingly, we affirm the dismissal of Tesoro's claims based on use of the PMM, but reverse the dismissal of claims based on the government's minority preference policy and remand for further proceedings.