Marshall et al v. UNITED STATES OF AMERICA et al Doc. 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROLAND MARSHALL, CANTU SERVICES, INC., AND TEXAS DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES,	)	
Plaintiffs,	)	**Civil Action No. SA-16-CA-446-XR**
VS.	)	
UNITED STATES OF AMERICA, ET AL.,	)	
Defendants.		

ORDER

On this day came on to be considered Plaintiffs' motion for a temporary restraining order and motion for preliminary injunction (docket nos. 2 and 10) filed on May 13, 2016. Plaintiffs request that this Court issue an injunction prohibiting the United States Government from making an award of a food services contract at Fort Sam Houston and Camp Bullis, Texas.

Background

The Randolph-Sheppard Act (R-SA), 20 U.S.C. §107, provides employment opportunities to qualified individuals who are blind through the operation of vending facilities in federal buildings. The regulations interpreting this statute are found at 34 CFR 395.1, et seq. All parties in this case agree that the military troop dining facilities at issue in this case are "cafeterias" under the R-SA. To implement an R-SA program within a state, a state licensing agency (SLA) is responsible for recruiting, training, and licensing individuals who are blind or

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have a vision impairment to manage vending facilities. In Texas, the Department of Assistive and Rehabilitative Services (DARS) is the SLA.

Since 2001, DARS has been awarded the food services contracts at Fort Sam Houston and Camp Bullis (Joint Base San Antonio) (JBSA). In turn, DARS has selected Roland Marshall as the manager for the food services contract. Marshall has "teamed" with Cantu Services, Inc. to assist with the actual operation of the food services contract.

On December 30, 2014, JBSA issued a solicitation for food services.[1] The solicitation was amended on March 9, 2015 to include language in accordance with the Randolph-Sheppard Act.[2] An additional amendment took place on December 18, 2015 that added certain language as an addendum to Federal Acquisition Regulation 52.212-2.[3]

Due to the passage of time between the December 2014 original solicitation and the actual receipt and award of proposals, DARS' contract was extended on two occasions. DARS' contract was set to expire on January 31, 2016. Accordingly, a 3-month "bridge contract" was entered into to provide continuity of services.[4] In justifying awarding this bridge contract as a sole source (non-competitive contract), the contracting officer certified that the anticipated price was "fair and reasonable." The contract was again extended on April 20, 2016 through July 31, 2016.[5]

In the interim, JBSA received various responses to the solicitation. The responses were evaluated on the basis of three criteria: (1) technical acceptability based on sub-factor ratings

[1] Defendant Exhibit 1 admitted during the June 29, 2016 hearing. The solicitation was for a firm fixed-price requirement contract for a one-year base period and four option years.
[2] Defendant Exhibit 2 admitted during the June 29, 2016 hearing.
[3] Defendant Exhibit 3/Plaintiffs' Exhibit 3 admitted during the June 29, 2016 hearing.
[4] Plaintiffs' Exhibit 4 admitted during the June 29, 2016 hearing.
[5] Plaintiffs' Exhibit 5 admitted during the June 29, 2016 hearing.

(mobilization plan, staffing plan, quality control and contingency plan) against all evaluation criteria, (2) the proposed prices, and (3) a past performance confidence assessment. DARS was informed in April 2016 that its proposal (prepared actually by Marshall and Cantu Services) had been excluded from further consideration.[6] All parties agree that the only reason DARS was excluded from further consideration was that its proposed price was considered unreasonable.

At some point in time prior to April 2016, JBSA established an Independent Government Cost Estimate (IGCE). The IGCE is the Government's estimate of the resources and projected cost of the resources a contractor will incur in the performance of a contract. DARS' price proposal was 31.11% higher than the Government's IGCE.[7] JBSA determined that four other proposals were within the competitive range. Prior to the initiation of this lawsuit, JBSA intended to notify these four other potential vendors that they were deemed "competitive" and enter into discussions with each of them.

Once notified that it was excluded from further consideration, DARS (on behalf of itself and Mr. Marshall/Cantu Services) filed a protest. The contracting officer, Charles D. Rhea, sent a letter in response to the protest explaining the Government's position as to why DARS was excluded from further consideration.[8]

On May 9, 2016, pursuant to 20 U.S.C. §107d-(1)(b)[9], DARS filed a complaint with the Secretary of the Department of Education requesting that the Secretary convene a panel to arbitrate its dispute.[10] A panel has not yet been selected to date.

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[6] Plaintiffs' Exhibit 6 admitted during the June 29, 2016 hearing.

[7] Defendant Exhibit 4 admitted during the June 29, 2016 hearing. Inasmuch as an award has not yet been made by the Government, the Court is not detailing actual dollar amounts in this order.

[8] Defendant Exhibits 7 and 8 admitted during the June 29, 2016 hearing.

[9] "Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with

Government's motion to dismiss

In this motion the Government argues that this court lacks jurisdiction because Plaintiffs' allegations are a bid protest and relate to the procurement of a federal contract and accordingly the Court of Federal Claims has exclusive jurisdiction per 28 U.S.C. § 1491.

Relying upon the Administrative Procedures Act, 5 U.S.C. §§ 701, et seq. and *Kentucky v. United States*, 759 F. 3d 588 (6th Cir. 2014), Plaintiffs argue that this court has jurisdiction to enter an injunction.

Plaintiffs argue that they will be successful in the DOE arbitration and that panel will find that DARS was improperly excluded from further consideration. Plaintiffs contend, however, that the arbitration panel may only dictate that JBSA restore DARS for additional consideration. DARS argues that if JBSA is not enjoined from granting the award to another vendor, it will lose certain monies it receives from the Marshall/Cantu contract, Marshall will lose his livelihood (approximately $2 million in net profits per year), and that Cantu Services will be required to discharge all of its employees. No evidence was submitted as to how much lost profits Cantu Services may suffer. Plaintiffs further argue that the DOE arbitration panel is not authorized to award any lost profits. Plaintiffs argue that they will be irreparably harmed by the failure of an injunction to issue. Accordingly, Plaintiffs argue that this Court has "incidental equitable jurisdiction" that gives this Court authority to impose a temporary restraint in order to preserve the status quo.

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the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d–2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

[10] Plaintiffs' Exhibit 11 admitted during the June 29, 2016 hearing.

Analysis

In *Kentucky v. U.S.*, 759 F. 3d at 600, the Sixth Circuit stated:

> [T]he public policy in favor of economic stability and opportunities for the blind was … implicated, and additionally, OFB and the Army agree that sovereign immunity bars the arbitration panel (or a federal court) from granting OFB damages in the event that the Army is found to have violated the Act, … As a result, we conclude that requiring OFB to complete arbitration before challenging the Army's decision not to apply the Act would result in a loss for which there is no remedy, an irreparable harm. Therefore, OFB meets the irreparable-harm exception, and the district court could have—and should have—considered OFB's claim.

Yet nowhere in the opinion does the Court state where the Court derives its jurisdiction, *i.e.* the R-SA, the APA, or some other source.[11] Nor did that opinion address whether these claims should be exclusively brought in the Court of Federal Claims. Accordingly, this Court will review in turn the possible sources for jurisdiction in this case.

R-SA, 20 U.S.C. §107[12] and 107d-1[13]

[11] "The All Writs Act empowers the federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law' 28 U.S.C. § 1651. This expansive grant of authority includes a 'limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through prescribed channels.' *Arrow Transp. Co*., 372 U.S. at 671 n. 22, 83 S. Ct. 984." *Colorado v. United States*, 813 F. Supp. 2d 1230, 1234 (D. Colo. 2011). Plaintiffs, however, have not relied upon the All Writs Act for their jurisdictional argument in this case.

[12] 20 U.S.C. §107 states:

"(a) Authorization
For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.
(b) Preferences regulations; justification for limitation on operation
In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that--
(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

In this case the SLA filed a complaint with the Secretary of Education complaining that JBSA failed to comply with the provisions of the R-SA in excluding DARS/Marshall/Cantu Services from further consideration. Pursuant to this statute the Secretary must convene an arbitration panel. Pursuant to the statute the "decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Pursuant to the very terms of the R-SA, there is no subject matter jurisdiction conferred upon this district court at this time. Various court cases express differing opinions about what the standard of review may be in reviewing an arbitration panel's later decision, but this Court at this time need not reach any opinion about what later standard to apply. This Court does not currently have any subject matter jurisdiction of this matter under the R-SA.

Jurisdiction of this Court to conduct APA Review

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(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.
Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register."

[13] 107d-1 states:
"(a) Hearing and arbitration
Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.
(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration
Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Some courts have concluded that an arbitral award under the Randolph–Sheppard Act is reviewed as an agency action under the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; 20 U.S.C. § 107d–2. *In re Transcon Lines*, 89 F.3d 559, 563 (9th Cir. 1996); *Premo v. Martin*, 119 F.3d 764, 768 (9th Cir. 1997). The Fifth Circuit has not ruled on this issue. As stated above, an arbitration panel has not yet been convened and no arbitration decision has been rendered. Accordingly, no subject matter jurisdiction exists under the APA at this time, unless the Court adopts Plaintiffs' "incidental equitable jurisdiction" argument.

Incidental equitable jurisdiction

Should the DOE arbitration panel agree with Plaintiffs that they were wrongfully excluded from further consideration, and JBSA appeals such an arbitration award, this Court *may* have jurisdiction to review the arbitration award and decide if the panel was correct. If the arbitration award is affirmed (or should the Government not appeal an adverse arbitration award), DARS would be placed back into consideration for a food services contract. However, if JBSA is not immediately enjoined from issuing a contract award, another vendor would have secured the award, and Plaintiffs will have suffered the loss of significant profits and may have difficulty even bidding on the contract again if it suffers from the loss of equipment and current employees.

The Supreme Court has recognized that federal courts possess a "traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." *FTC v. Dean Foods Co*., 384 U.S. 597, 604, 86 S. Ct. 1738, 16 L.Ed.2d 802 (1966).

The D.C. Circuit has articulated the theory as follows: "if a court may eventually have jurisdiction of the substantive claim, the court's incidental equitable jurisdiction, despite the agency's primary jurisdiction, gives the court authority to impose a temporary restraint in order to preserve the status quo pending ripening of the claim for judicial review." *Wagner v. Taylor*, 836 F.2d 566, 571 (D.C. Cir. 1987). "Thus, in order to grant the type of preliminary injunction that plaintiffs seek, this Court must 'eventually' have jurisdiction over plaintiffs' substantive claims. Put another way, the Court must ask whether it will have jurisdiction to review the arbitration panel's decision at the conclusion of the arbitration proceedings." *Colorado Dep't of Human Servs. v. United States*, 74 Fed. Cl. 339, 347 (2006). If the Plaintiffs prevail in their arbitration proceeding, it is unlikely that this Court will "eventually" have jurisdiction over any of Plaintiffs' substantive claims. Plaintiffs' only substantive claim before the arbitration panel is that it should not be excluded from consideration of the contract. Accordingly, enjoining the award of any food services contract is too attenuated for this Court to possess incidental equitable jurisdiction.

Are Plaintiffs' claims subject to the exclusive jurisdiction of the Court of Federal Claims?

JBSA argues that this claim is essentially a bid protest, subject to the Tucker Act, and accordingly such claims must be heard exclusively by the Court of Federal Claims pursuant to 28 U.S.C. §1491(a)(1). Although the Government is correct that bid protests generally are within the exclusive jurisdiction of the Court of Federal Claims, in R-SA cases that court has determined that the R-SA requires exhaustion of administrative procedures before an aggrieved SLA may raise an RSA claim in that court. Accordingly, in a case similar to this one where an arbitration decision has not been rendered, the Court of Federal Claims has held that it lacks

jurisdiction to hear any pre-arbitration matter. *See Kentucky v. United States*, 62 Fed. Cl. 445, 460 (2004), aff'd sub nom. *Kentucky, Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222 (Fed. Cir. 2005).

Request for Injunctive Relief

In the event that this Court has erred in concluding that it currently lacks subject matter jurisdiction in this case, the Court will proceed to evaluate the merits of Plaintiffs' request for injunctive relief.

Analysis of Plaintiffs' request for injunctive relief

"A preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest." *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998).

Plaintiffs fail to establish a substantial likelihood of success on the merits

Plaintiffs argue that JBSA incorrectly calculated the Independent Government Cost Estimate for the food services contract. Additionally, they argue that two of the four vendors found to be in the competitive range had unsatisfactory technical ratings. They also argue that the remaining two vendors had lower performance assessments than DARS/Marshall/Cantu Services. Plaintiffs also contend that JBSA incorrectly interpreted and applied the addendum to FAR 52.212-2 that was made applicable to the solicitation. Finally, Plaintiffs construe 43 C.F.R. § 395.33 as mandating that a blind vendor must be afforded a food services contract as long as

the bid quoted was a reasonable cost, and that since their bid was substantially the same as the current arrangement approved by the government, their bid was reasonable, despite the fact that other vendors submitted bids substantially lower than Plaintiffs.

20 U.S.C. §107 provides that "priority shall be given to blind persons licensed by a State agency…." The implementing regulation, 34 C.F.R. 395.33 states: "In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality." Accordingly, the R-SA contemplates that blind vendors advanced by the SLA will be given a "priority" over other vendors, if their bids are comparable in cost as the bids submitted by other vendors.

Plaintiffs in this case have not established that they have submitted comparable price bids. Plaintiffs have not established that the IGCE was inaccurate. Even if Plaintiffs have raised a question as to why two of the four vendors were found to be in the competitive range with unsatisfactory technical ratings, Plaintiffs fail to establish that their bid was comparable to the remaining two vendors. Even though DARS rated "substantial confidence" in its performance assessment, one other bidder had a satisfactory rating and the other had a neutral rating. There was no requirement in the solicitation that required JBSA to rank this one factor more important than the bid price.

Plaintiffs contend that the Court's analysis is incorrect and they merely must establish that there exists a substantial likelihood that they will prevail at the DOE arbitration panel. The fact remains, however, that Plaintiffs are seeking that this Court enjoin JBSA from making an

award of the food services contract. Even if Plaintiffs were to prevail at the DOE arbitration panel, that panel can only dictate that DARS should not have been excluded from further consideration. The DOE arbitration panel will not award the food services contract to DARS. Assuming DARS is given further consideration in the bidding process, there is no assurance given its bid price that it will be awarded the contract.

Substantial threat that the movant will suffer irreparable injury if the injunction is denied

DARS itself submitted no argument that it will suffer irreparable injury. Marshall contends that he will suffer the loss of significant profits. Cantu Services argued, but did not present any evidence, that it will suffer from a loss of staffing talent, the loss of "incumbency" and loss of equipment due to lack of use and maintenance.[14] All parties in this case appear to stipulate that the doctrine of sovereign immunity prohibits the DOE arbitration panel (and presumably any reviewing court) from awarding any lost profits to Plaintiffs should they ultimately prevail in their quest to reestablish the JBSA food services contract. Accordingly, this factor weighs in favor of Marshall. *See Kentucky ex rel. Educ. & Workforce Dev. Cabinet Office for the Blind v. United States*, 2014 WL 7375566, at *8 (W.D. Ky. Dec. 29, 2014), reconsideration denied sub nom. *Kentucky ex rel. Educ. & Workforce Dev. Cabinet Kentucky Office for the Blind v. United States*, 2015 WL 1541987 (W.D. Ky. Apr. 7, 2015) (public policy

[14] It appears that Cantu Services, Inc. has "teamed" with other individuals and entities besides DARS and Mr. Marshall for other military food services contracts. Accordingly, it is uncertain what, if any, irreparable injuries it may suffer if an injunction is denied with regard to the JBSA contract. See http://www.cantuservices.com/awards.html.

favors ensuring economic stability and opportunities within the blind community, and sovereign immunity would avert a grant of money damages).[15]

Does the threatened injury outweigh any damage that the injunction might cause the Defendant?

If this Court enjoins the award of a food services contract, the United States Armed Forces will be required to continue using the DARS/Marshall/Cantu Services "team" to feed its troops. It will be required to pay the DARS team tens of millions of dollars more than it would otherwise be required to expend. If the Court denies the injunction and if Plaintiffs are successful during the DOE arbitration panel, and if as a result they are able to compete in a new solicitation process, and if their bid receives a "best value determination" and meets the remaining criteria, they will regain the contract, but lose lost profits in the interim. DARS will not suffer any irreparable harm. The testimony solicited during the evidentiary hearing establishes that Mr. Marshall has personally made millions of dollars in salary and profits from these food services contracts. Cantu Services benefits from its teaming relationship with Mr. Marshall. Plaintiffs have not established that the granting of injunctive relief does not outweigh the monetary damages such an injunction might cause the Defendant.

Will granting of an injunction disserve the public interest?

Congress articulated public policy by enacting the R-SA. The Congress desired to provide "blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting…." 20 U.S.C. § 107(a). The caselaw, however, is less than clear as to what

[15] *Contra Colorado v. United States*, 813 F. Supp. 2d 1230, 1236 (D. Colo. 2011) (rejecting loss of livelihood and other economic claims as irreparable injury).

Congress intended in these broad, vague phrases. *See e.g., State of Kansas v. United States*, 2016 WL 3458913, at *5 (D. Kan. June 24, 2016) (reviewing whether the Tucker Act is applicable to R-SA claims, and whether the Court of Federal Claims has exclusive jurisdiction). Further confusing this issue is what was meant by Congress's use of the phrases "priority" shall be given to licensed blind persons "wherever feasible." Finally, the implementing regulation suggests that before "priority" can be afforded to a blind person, any bid submitted by a SLA/blind person must first be "comparable" as that available from other providers of food services. As stated above, if an injunction is granted as requested by Plaintiffs, the U.S. Armed Forces (via taxpayer monies) will be required to expend millions of dollars more in food services. Plaintiffs have not established that the injunction will not disserve the public interest.

Conclusion

DARS' request for a preliminary injunction (docket no. 10) is denied. Marshall and Cantu Services, Inc.'s request for a preliminary injunction (docket no. 2) is denied. The motions to dismiss (docket nos. 7 and 12) are granted in part and denied in part as discussed above). This case is dismissed for lack of subject matter jurisdiction. The Clerk is directed to close this case.

SIGNED this 6th day of July, 2016.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE