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REPLY BRIEF

2011-5063

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESOURCE CONSERVATION GROUP, LLC

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of
Federal Claims in Case No. 08-CV-768
Judge Susan G. Braden

REPLY BRIEF OF PLAINTIFF-APPELLANT, RESOURCE CONSERVATION GROUP, LLC

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STATEMENT OF RELATED CASES

This case was previously on appeal before the United States Court of Appeals for the Federal Circuit in *Resource Conservation Group, LLC v. United States*, Case No. 2009-5091. This earlier appeal was decided on March 1, 2010 by a panel consisting of Circuit Judges Lourie and Dyk and District Judge Kendall. The citation of the opinion rendered in the earlier appeal is *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010).

REPLY OF PLAINTIFF-APPELLANT RESOURCE CONSERVATION GROUP, LLC

In this case Resource Conservation Group, LLC ("RCG") contends that the Department of Navy (the "Navy") breached an implied contract of good faith and fair dealing by failing to advise RCG that, despite its broad authority to lease the Naval Academy Dairy Farm property pursuant to 10 U.S.C. § 6976, the Navy could not lease the property to RCG for mining purposes because such use was prohibited based on the Navy's interpretation of 41 C.F.R. § 102-71.20. The Navy knew that RCG and another potential bidder sought to lease the property for mining purposes and authorized RCG in writing to enter the property and to drill the property to investigate the mineral resources prior to RCG's bid. The Navy contends that it had no duty or obligation to advise RCG that a mining proposal could not be considered because it would be "non-responsive" and disqualify RCG. The Navy argues, even though its decision rests upon an interpretation of an obscure definition in the Federal Management Regulations, that the Navy had no obligation to disclose this interpretation and that it was incumbent upon RCG as a bidder to foresee the Navy's response to its proposal.

RCG contends that the Navy's conduct was arbitrary and was a breach of its obligation to deal in good faith and further that the Navy's interpretation that 10

U.S.C. § 6976 does not permit the leasing of said property for mining purposes is wrong.

It is uncontested that the Department of Navy knew of RCG's proposed use; it encouraged RCG's proposal by providing RCG with a written license to drill the Naval Academy Dairy Farm to test the material in order to investigate the amount of viable mineral reserves. RCG proffers in response to the Government's claim regarding failure to state a claim upon which relief may be granted, that the Department of Navy adopted its interpretation of 10 U.S.C. § 6976 after it received public and governmental opposition to RCG's proposed use. When asked for an explanation of it's interpretation, and when the interpretation was made, the Department of Navy refused to provide the legal analysis for its position. Instead, reciting that it need not do the legal research for a perspective bidder and that it was under no obligation to disclose its interpretation to RCG prior to the submission of proposals, or for that matter, after determining the proposal non-responsive. RCG contends that this conduct was arbitrary and an illegal action on the part of the Navy and, as a result, RCG expended significant sums of money for bid preparation in vain. RCG did not seek to rescind the award of the lease or seek an injunction to prevent the award. RCG simply wants the Navy to make it whole, because its losses are the direct result of the Navy making a political decision in the middle of the bid

process. RCG resigned itself to the fact that the political climate would not ultimately allow for the mining of sand and gravel on the Naval Academy dairy property, even though the proposal it submitted proved to be more beneficial to the Government.

SUMMARY OF REPLY ARGUMENT

In Appellee's Brief, the Navy incorrectly argues that RCG has waived its right to challenge the Court of Federal Claims' reliance on 41C.F.R. §102-71.20 and attempts to avoid the facts alleged by RCG in its Complaint. The Navy erroneously argues that RCG should have foreseen that it would rely on 41 C.F.R. §102-71.20.

The correct remedy in this case is to reverse and remand for trial on the merits. The lower court did not rule on the merits and accordingly this court should remand for a full trial.

ARGUMENT

I. THE NAVY'S INTERPRETATION OF 10 U.S.C. § 6976 IS WRONG.

There are two components to 10 U.S.C. § 6976. Sub-part (a)(1) provides the Navy with discretion to terminate or reduce operations of the Dairy Farm. Sub-part (a)(2) limits the Navy's broad discretion to reduce or terminate the operations by prohibiting the Navy from declaring the 875 acre property to be excess property and either transferring or disposing of the *real property containing the dairy farm* (emphasis added).

Sub-part (b) of 10 U.S.C. § 6976 provides the Navy with broad authority and discretion to lease the Dairy Farm under such terms as the Navy deems appropriate subject only to the restrictions in sub-part (a)(2) that the *real property containing the dairy farm* not be declared to be excess, transferred or disposed of and that any lease be subject to the condition that the rural and agricultural nature of the property be maintained.

In this case, RCG's proposal did not ask the Navy to dispose of the 875 acre property. RCG proposed to lease a *portion* of the property for a limited mining operation followed by the reclamation of the land. In order to justify its refusal to consider RCG's bid, the Navy interprets 10 U.S.C. § 6976 to prohibit it from leasing the property for mining purposes despite the broad discretion conveyed to the Navy in the statute. The Navy's interpretation of 10 U.S.C. § 6976 does not rest on the plain language of the statute. Rather, the Navy's interpretation rests upon the definition of the term "real property" set forth in the Federal Management Regulations in 41 C.F.R. § 102-71.20 that includes "embedded gravel, sand or stone." Based on this section of the Federal Management Regulations, the Navy concludes that RCG's proposal would amount to a prohibited "disposal" of the real property under 10 U.S.C. § 6976 rather than a lease of the property. Notwithstanding the express language in 41 C.F.R. § 102-71.20 that limits application of the regulation

to the real property "policies" of the General Services Administration ("CSA"), the Navy clings to this tenuous rationale as its sole justification for refusing to fairly and honestly consider RCG's bid.

In their Brief, at pages 19-20, the Navy argues that RCG has waived its right to argue that the express language of 41 C.F.R. § 102-71.20 states that its application is limited to the real property policies of GSA by failing to raise the issue below. This of course is not the case. RCG has argued throughout these proceedings in its Complaint and its various motions and memoranda submitted to the Court of Federal Claims that the Navy's interpretation of 10 U.S.C. § 6976 in reliance upon the term "real property" in 41 C.F.R. § 102-71.20 was wrong. In paragraph 8 of RCG's Complaint, it specifically referred to the Navy's April 30, 2007 letter advising RCG that it would not consider its bid which letter specifically referred to 41 C.F.R. § 102-71.20. The Navy's erroneous interpretation of 10 U.S.C. § 6976 in reliance on 41 C.F.R. § 102-71.20 is again mentioned in paragraphs 9, 11 and 12 of RCG's Complaint. The Navy's erroneous interpretation of 10 U.S.C. § 6976 in reliance on 41 C.F.R. § 102-71.20 is again discussed in RCG's Opposition to Defendant's Motion to Dismiss at page 10 and in RCG's Supplemental Memorandum in Opposition to Defendant's 12(b)(6) Motion to Dismiss at page 10. In addition, the applicability of the definition of "real property" in 41 C.F.R. § 102-71.20 to 10 U.S.C. § 6976 is

discussed throughout the Navy's Motion to Dismiss and the various memoranda submitted by the Navy and was specifically relied on by the Court of Federal Claims ("CFC") in support its decision to grant the Navy's Motion. Given the CFC's reliance on 41 C.F.R. § 102-71.20 and the parties' arguments throughout the proceedings below, RCG is not precluded from arguing that the trial court was wrong in applying 41 C.F.R. § 102-71.20 to 10 U.S.C. § 6976.

II. HONEST CONSIDERATION OF RCG'S BID REQUIRED THAT THE NAVY DISCLOSE ITS INTERPRETATION OF 10 U.S.C. § 6976

The Navy's argument that RCG has not stated a claim for breach of an implied contract because it was ignorant of the law is offensive and its assertion that bidders are responsible for knowing published statutes and regulations misses the point of this case entirely. According to the Navy, despite the clear and unambiguous language of 10 U.S.C. § 6976 that vests the Navy with broad discretion to lease the Dairy Farm on such terms it deems appropriate, after RCG advised the Navy that it was submitting a bid to lease the property for mining purposes and after obtaining permission from the navy to drill the property for purposes of evaluating its mining potential, RCG somehow should have foreseen that the Navy would refuse consideration of its bid in reliance upon 41 C.F.R. § 102-71.20. In other words, after telling the Navy that it was interested in mining the property and after obtaining the

Navy's permission to drill and evaluate the property for mining, RCG should have assumed that the Navy would reverse field and somehow determine that its broad authority to lease the property was limited by the policy combined 41 C.F.R. § 102-71.20.

It is clear that the Navy seeks to evade the simple truth here. Rather than explain why it was not obligated to state that mining would constitute a prohibited disposal of real property when RCG advised the Navy that it would submit a mining proposal and when it asked for permission to enter the premises to explore the property for mining, the Navy maneuvers around the issue with a series of detached legal arguments. For example, the Navy argues that the superior knowledge doctrine is not applicable in the context of an implied contract of fair and honest dealing because no Court has yet to apply it in such a contact (although Navy cites no case where a court has held that it is inapplicable). This implication of this argument would allow the government unbridled latitude, until an actual contract is signed. Rather, we believe the solicitation process must be governed by the same good faith, fairness doctrine. The Navy also argues that if it had superior knowledge, it was only of the law and not a "vital fact" that it was obligated to disclose to RCG. On page 28 of its Brief, the Navy makes the incredible argument that its notice for proposals gave RCG notice of the statutory restrictions applicable to the solicitation although the

solicitation made no reference to 41 C.F.R. § 102-71.20. On page 28, the Navy argues that RCG acted "irrationally" by submitting its mining proposal because the solicitation made no reference to mining as being a permitted use even though the solicitation did not identify mining as prohibited use.

In reality, there was no reason for RCG to even suspect that the Department of Navy had adopted this interpretation. The Notice of Availability for Lease for the Bid Solicitation provided an outline of the lease provisions. Appendix F contained a list of prohibited uses.[1] (Exhibit 1, Plaintiffs Opp. to Def. Motion to Dismiss.) Not only was mining not listed as a prohibited use, as noted, the Navy actually licensed the physical drilling of the property to determine the amount of reserves. RCG had no

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[1] The list prohibited:

- Any use that adversely affects the health, safety, morals, welfare, morale, and discipline of the Armed Forces, such as the sale or use of drug abuse paraphernalia, illicit gambling, or prostitution on the leased property.
- Any use that requires an environmental permit for the storage, treatment, transportation, disposal, or manufacture of hazardous materials, hazardous substances, or hazardous wastes on the leased property and is incompatible with Government objectives.
- Any use that allows partisan political activities on the leased property.
- Any use by entities advocating the overthrow of the United States on the leased property.

In accordance with Department of Navy policy; consumption, sale or distribution of alcoholic beverages is and shall be prohibited on the property, except within private residential quarters, or except as approved in advance by the Government.

reason to investigate the efficacy of its proposed use.

Alternatively, if the Department of Navy came upon this interpretation only after the submission of bids, it adopted an after the fact rationalization to turn down RCG's submission (even though RCG would have provided more compensation than any other bidder). This would be tantamount to an act of bad faith, clearly violative of APA standards as well as inconsistent with the terms of its own solicitation. At a minimum, such action would be arbitrary and entitle RCG to recover its bid preparation expenditures.

This Honorable Court has indicated that the Government may be held liable for a breach of contract for non-disclosure when (1) the contractor undertakes to perform without vital knowledge of a fact that could affect performance, cost, or direction; (2) the Government is aware that the proposed contractor had no knowledge and had no reason to obtain such knowledge; (3) the contractor solicitation specifications do not put the contractor on notice to inquire regarding this issue, and (4) the Government fails to provide the relevant information. *See Northrop Grumman Corp., Military Aircraft Div. v. United States,* 63 Fed. Cl. 12 (2004) *citing AT&T Communications, Inc. v. Perry,* 296 F.3d 1307 (Fed. Cir. 2002); *see also Helene Curtis Indus. v. United States,* 312 F.2d 774 (Ct. Cl. 1963). RCG meets these tests.

First, the RCG undertaking was to lease the property for mining purposes;

second, the Government was aware of this purpose and understood that RCG believed it to be legal; third, the solicitation documents and the Navy's conduct in allowing to conduct extensive exploration on the Dairy Farm as part of preparing its proposal mislead RCG into believing that it could achieve its purpose; and, finally, the Government failed to provide any relevant information regarding the RCG's proposed use prior to the submissions. It should be noted that the determination of whether there is a duty to disclose is in part a factual determination which has never been addressed by the Court below and one which may not be addressed *sua sponte* at the appellate level. Accordingly, this court should reverse the trial court's decision and remand this matter for trial.

CONCLUSION

For these reasons, this matter should be remanded to the U. S. Court of Federal Claims for a full review of the allegations regarding RCG's contractual claim.

Respectfully submitted this 1 day of July 2011.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY, under the penalty of perjury that on this 1 day of July, 2011 an original and eleven copies of the foregoing Reply Brief of Appellant was hand-filed with the Office of the Clerk, United States Court of Appeals for the Federal Circuit and further certify that I served, via first class mail, postage prepaid two copies to the following:

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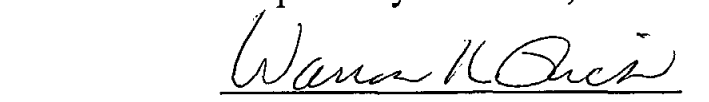
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rule 28(a)(14) and Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Appellant hereby certifies that the foregoing Reply Brief of Appellant complies with the type-volume limitation proscribed in Federal Rule of Appellate Procedure 32(a)(7)(b) and also typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief was prepared in proportionally spaced typeface using the Word Perfect 12 word processing program in Times New Roman, 14 point typeface.

Appellant's counsel has relied on the word count function of the word-processing program used to prepare this Reply Brief of Appellant, which indicates that this brief contains 2,513 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

Respectfully submitted,



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