

In the United States Court of Federal Claims

No. 10-17C
(Filed: February 4, 2010)

**FRONTLINE HEALTHCARE
WORKERS SAFETY FOUNDATION,
LTD.,**

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER DENYING INJUNCTIVE RELIEF AND DISMISSING COMPLAINT

Frontline Healthcare Workers Safety Foundation, Ltd. (“Frontline”) submitted an unsuccessful offer in response to a National Science Foundation (“NSF”) solicitation for services in support of NSF’s Graduate Research Fellowship Program (“GRFP”). Compl. ¶ 2. On December 3, 2009 NSF awarded the contract to another offeror, and Frontline protested at the Government Accountability Office (“GAO”) on December 18, 2009. *Id.* Under the Competition in Contracting Act (“CICA”), 31 U.S.C. §§ 3551-3557, Frontline’s GAO protest triggered an automatic stay of contract performance by the awardee during the pendency of Frontline’s protest. 31 U.S.C. § 3553(d)(3). NSF initially directed the awardee to suspend performance. Def.’s Resp. 2. However, on January 7, 2010 the agency exercised authority under CICA to partially override the automatic stay. Compl., Ex. B. On January 12, 2010, Frontline filed its Complaint in this Court solely to challenge NSF’s decision to override the CICA stay while Frontline’s protest remains pending at GAO.

CICA permits an agency to override the automatic stay “upon a written finding that . . . urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General.” 31 U.S.C. § 3553(d)(3)(C)(i). This Court has jurisdiction under 28 U.S.C. § 1491(b)(1) to review an agency’s override decision. *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999). For the Court to set aside NSF’s override and reinstate the CICA stay, Frontline must demonstrate that NSF’s partial override was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); 28 U.S.C. § 1491(b)(4); *Centech Group, Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009).

After considering Frontline’s Complaint, its Motion for Injunctive Relief, the Government’s Response, and the arguments voiced during a hearing, the Court has determined that NSF’s override was not arbitrary or capricious. NSF documented a reasonable Determination and Findings, concluding that urgent and compelling circumstances necessitated a partial override. Def.’s Resp., Exhibit A (“D&F”). Frontline insists that urgent and compelling circumstances are not present here, drawing a contrast between this case and others involving national security and wartime contracting. Pl.’s Mot. 4 (citing *Alion Sci. & Tech. Corp. v. United States*, 69 Fed. Cl. 14 (2005)).¹ In response, the Government argues—and the Court agrees—that matters of national security are not the only context in which urgent and compelling circumstances arise. Def.’s Resp. 10; see *PGBA, LLC v. United States*, 389 F.3d 1219, 1225-26 (Fed. Cir. 2004) (agreeing with the Government’s characterization of 28 U.S.C. § 1491(b)(3)’s mandate to consider national security interests as “simply a ‘super-priority’ provision, which instructs courts to give extra consideration to issues of national defense and national security”).

NSF found that this year’s GRFP, “a designated Presidential and Congressional Priority,” could not proceed successfully without a partial override. D&F 3. “Without Contractor support, NSF will not be able to award approximately 2,000 fellowships and may risk losing appropriated funds for the upcoming educational cycle,” NSF found. *Id.* The agency recognized a compelling need to award the fellowships prior to April 15, 2010, the date by which applicants must respond to graduate schools’ offers of admission and financial aid. *Id.* To award the fellowships by that date, NSF had to maintain a schedule carefully orchestrated to allow approximately 800 panelists to travel to the Washington, D.C. area and review more than 12,000 applications. *Id.* at 4. Without the services of the awardee between January and April 2010, NSF determined that it could not operate this program. *Id.* at 8-9.

Accordingly, NSF decided to partially override the CICA stay and authorize contract performance by the awardee through April 2010. The Government notes that NSF found—and Frontline has not contested—that the work being authorized under the partial override amounts to approximately 8% of the contract. Def.’s Resp. 15. Thus, if Frontline were to prevail at GAO and ultimately obtain this contract, up to 92% of the work would remain available for Frontline to perform. It is clear to the Court that NSF’s partial override constituted a lawful exercise of its discretion under CICA to act on urgent and compelling circumstances significantly affecting the interests of the United States, and that the agency did so in a way that was not arbitrary, capricious, or an abuse of its discretion. Therefore, the Court will not grant the declaratory relief Frontline seeks in its Complaint.

Nor is Frontline entitled to injunctive relief. On a motion for injunctive relief, the Court considers whether: (1) the plaintiff has succeeded or, in the case of a preliminary injunction, is

¹ Frontline also expressed frustration regarding the amount of time it took NSF to award the contract, arguing that NSF’s delays should now be held against the agency. The Government responded with a reasonable explanation for why NSF was not able to award the contract by the date it had originally intended, and explained that the award was not unduly or inappropriately delayed. Absent a showing of bad faith conduct, the Government takes the view that Frontline’s assertion of agency delays should be disregarded. Indeed, Frontline has not directed the Court to any relevant authority regarding agency delay or articulated a clear legal theory that might give effect to its allegations here.

likely to succeed on the merits; (2) the plaintiff will suffer irreparable injury absent injunctive relief; (3) the harm the plaintiff will suffer outweighs the harm that the Government and third parties would suffer; and (4) granting an injunction serves the public interest. *PGBA, LLC*, 389 F.3d at 1229; *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 709 (2006). Frontline has not made a persuasive argument on any of these factors. On the merits, the Government has convinced the Court that NSF's override was not arbitrary or capricious. Regarding whether Frontline might suffer irreparable injury, the Government points out that even if the CICA stay is reinstated, the portion of the contract that the partial override covers will probably not be performed by Frontline or anybody else. The agency has determined that if the awardee cannot continue to perform through April 2010, this year's GRFP awards will not be made, and therefore the immediate work necessary to make those awards would be eliminated from the contract. The Government has made a strong showing that NSF would be harmed substantially if it were prevented from continuing this year's GRFP with the awardee's support. Finally, consideration of the public interest weighs firmly in favor of allowing NSF the resources that it believes are necessary to ensure that qualified applicants receive GRFP awards and that the funds Congress appropriated for that purpose be distributed as directed. Therefore, Frontline's Motion for Injunctive Relief is denied. The Clerk of the Court is directed to dismiss Frontline's Complaint.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge