United States Court of Appeals for the Federal Circuit

2008-5012

PRECISION IMAGES, LLC,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-712,
Judge Margaret M. Sweeney.

REPLY BRIEF OF PLAINTIFF-APPELLANT, PRECISION IMAGES, LLC

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March 25th, 2008

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A POST-AWARD PROCUREMENT PROTEST TRIBUNAL'S ADMINISTRATIVE RECORD REVIEW CANNOT BE SUBSTITUTED AS A NEW RATIONALIZATION FOR CHALLENGED AGENCY ACTION

The United States Court of Federal Claims substitutes a new rationalization for this challenged commercial items Acquisition by looking beyond this Air Force Contracting Officer's one-page Best Value (Tradeoff) Decision set out on the very last page of the eight-page Source Selection Decision Document. This is conceded when the Air Force argues in its Red Brief that Precision Images is claiming "form over substance" when Precision Images adheres to the stated rationalization, Appellee's Brief, at 42, and when the Air Force says that Precision Images' "only argument is that the SSA [the Source Selection Authority, here, the Air Force Contracting Officer] did not write a good-enough 'Decision' paragraph in the SSDD [Source Selection Decision Document] . . . ," *Id.*

The Air Force is right. Administrative Record review cannot be substituted to support this challenged commercial items Acquisition. There can be no new rationalization.

Because Precision Images' past Performances are not "relevant" (Precision Images has no experiences as a manufacturer of commercial off-the-shelf lightweight, hand-

held ultrasonic flaw detectors) just as "relevant" Performance is narrowly-defined under the terms of this Solicitation, terms drafted solely by the Air Force, the United States Court of Federal Claims correctly decides that the Air Force is violating Federal Acquisition Regulation 15.305(a)(2)(iv) because the Air Force Performance Confidence Assessment Group assigns Precision Images an unlawful overall "Little Confidence" Performance confidence assessment and then the Air Force Contracting Officer trades-off this "Little Confidence" Performance confidence assessment against Precision Images' substantial Price advantage. *Precision Images, LLC v. United States, et al.,* No. 07-712C (Fed. Cl. Nov. 15th, 2007, reissued Dec. 20th, 2007), *2007 U.S. Claims LEXIS 404, *92-*93.*

Having thus found that this particular Source Selection, this Award, violates Federal Acquisition Regulation 15.305(a)(2)(iv) and therefore that the challenged Contract awarded by the Air Force to GE Inspection Technologies is not "rational" as is defined by 5 U.S.C. § 706(2)(A), (D), the Court of Federal Claims may not substitute its own review of the Administrative Record as a new rationale in place of the Air Force's unlawful overall "Little Confidence" Performance confidence assessment for Precision Images followed by the Air Force Contracting Officer's

trade-off rationale. Consider *Yale-New Haven Hospital v. Leavitt*, 470 F.3d 71 (2nd Cir. 2006):

> Generally speaking, after-the-fact rationalization for agency action is disfavored. *See SEC v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943)* ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Citizens to Preserve Overton Park, 401 U.S. at 419* (internal citations omitted) (criticizing lower court's reliance on "post hoc" litigation affidavits in reviewing agency action); *see also Forest Watch v. United States Forest Serv., 410 F.3d 115, 119 (2d Cir. 2005)*; *Envtl. Def. Fund, Inc. v. Costle, 211 U.S. App. D.C. 313, 657 F.2d 275, 284 (D.C. Cir. 1981)* ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made. . . . not some new record completed initially in the reviewing court."). At the same time, an agency may supplement the administrative record before the reviewing court in some circumstances—among them, if "the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997)* (citing *Overton Park, 401 U.S. at 420*); *see also Camp v. Pitts, 411 U.S. 138, 143, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973)* ("If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy [is] . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary."); *Action on Smoking & Health v. Civil Aeronautics Bd., 230 U.S. App. D.C. 1, 713 F.2d 795, 798 n.2 (D.C. Cir. 1983)* ("Where, as in *Camp* . . ., the agency's explanation is required to be responsive to the purposes of the enabling statute, rather than to a record developed through mandatory hearings or public comments, *post hoc* explanations, while undesirable, are not fatal.") (internal citation omitted); *see also Shalala v. Ill. Council on Long Term Care, 529 U.S. 1, 23, 120 S. Ct. 1084, 146 L. Ed. 2d 1, 24 (2000)* ("[A] court reviewing an agency determination under *§ 405(g)* has adequate authority to resolve any statutory or constitutional contention that the agency does not, or can-

> not, decide, including, where necessary, the authority to develop an evidentiary record."); *Citizens to Preserve Overton Park, 401 U.S. at 419.*
>
> *Some tension is evident between the general principle (disfavoring the after-the-fact rationalization of agency action) and the exceptions. The District of Columbia Circuit resolves the tension by positing that "[t]he new materials should be merely explanatory of the original record and should contain no new rationalizations." Envtl. Def. Fund, 657 F.2d at 285*; *see also Bunker Hill Co. v. Environmental Protection Agency, 572 F.2d 1286, 1292 (9th Cir. 1977)* ("[T]he augmenting materials were merely explanatory of the original record. No new rationalization of the . . . regulations was offered by the EPA. Instead, the augmenting materials clarified a dispute that we felt was less than clear from the original record and were clearly admissible."). *That analysis is persuasive, and gives effect to all the precedents. We therefore hold that to the extent that an agency may supplement the record on judicial review of the validity of a rule that is interpretive, it may do so only if the proffered evidence illuminates the original record and does not advance new rationalizations for the agency's action.*

Id., 470 F.3d, at 81-82 (Emphasis added). *See also Tripoli Rocketry Association, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 437 F.3d 75, 82 (D.C. Cir. 2006) ("[C]ry for deference is hollow . . . where agency has articulated no reasoned basis for its decision . . . .); *AT & T Information Systems, Inc. v. General Services Administration*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (Administrative record review "may not be employed to offer post-hoc rationalizations where no rationalization exists.").

The Air Force Contracting Officer here gives away Precision Images' nineteen percent Price advantage, or $765,545, when she expressly trades-off Precision Im-

ages' substantial Price advantage over GE Inspection Technologies against the Air Force Performance Confidence Assessment Group's unfavorable and unlawful evaluation of Precision Images' "relevant" past Performance. This Administrative Record could have supported an Award to GE Inspection Technologies had this Air Force Contracting Officer expressly adopted, or re-stated, other determinations of the Air Force Evaluation Team (the Air Force Performance Confidence Assessment Group) setting out "the advantages associated with . . . greater experience and not simply the difference between the . . . offerors' performance confidence ratings" and traded these advantages off against Precision Images' substantial Price advantage. *HoveCo*, B-298697, Nov. 14th, 2006, *2006 U.S. Comp. Gen. LEXIS 189, *7-*8.

But this did not happen. Administrative Procedure Act review, 5 U.S.C. § 706-(2)(A), in a Post-Award Procurement Protest is confined to the Administrative Record, *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000), *and to the rationale set out by the Agency decision-maker* at the time the Award is made. Anything else substitutes the judgment of the United States Court of Federal Claims for the independent judgment of the Air Force Contracting Officer, and *it is the independent judgment of the Air Force Contracting Officer, not the*

tribunal's judgment on Administrative Procedure Act review, which is required by Federal Acquisition Regulation 15.308.

ALLOWING THE AIR FORCE TO MAKE A NEW BEST VALUE AWARD ON THE EXISTING ADMINISTRATIVE RECORD ACCOMPLISHES NOTHING MORE THAN A STERN FINGER WAGGING

There is something wrong with this Acquisition and the something that is wrong here is that on August 30th, 2007 the Air Force Performance Confidence Assessment Group changed its overall Performance confidence assessment for Precision Images from "Unknown Confidence" to "Little Confidence." For this change in the overall Performance confidence assessment for Precision Images from "Unknown Confidence" to "Little Confidence" there must, as required by this Solicitation, have been identifiable "relevant" Performances by Precision Images. But there are no such identifiable "relevant" Performances by Precision Images, either as submitted by Precision Images with its initial Competitive Proposal, or as submitted by Precision Images in responses to Discussions. A000847.

The Air Force must have thought it important to expressly make an unfavorable and unlawful evaluation of Precision Images' "relevant" past Performance. Allowing the Air Force now to remedy this unlawful evaluation of Precision Images'

"relevant" past Performance with a substituted Best Value (Tradeoff) Decision which considers both past Performance and Price will not remove this taint from these proceedings.

These are commercially-available off-the-shelf lightweight hand-held microprocessor-based ultrasonic flaw detectors and each is not much bigger that a leather-bound copy of *Black's Law Dictionary*, 7th Edition (West Group, 1999). The Air Force has decided that Technical merit is not to be evaluated, requiring only that each offered instrument meets the baseline standards of technical acceptability provided in the Air Force's seven-page Product Description (and all three offered instruments do so). *Precision Images, 2007 U.S. Claims LEXIS 404, *16-*17.*

Removal of this illegal taint requires elimination of past Performance as a selection criterion but this is not, as the Red Brief would have it, a "trap-door" legal argument. Appellee's Brief, at 36. As a result of the Air Force's unlawful overall "Little Confidence" Performance confidence assessment for Precision Images, Price is now the only basis on which the promised Award may lawfully be made. And Precision Images has the lowest Price.

In *Parcel 49C Limited Partnership v. United States*, 31 F.3d 1147, 1153 (Fed. Cir. 1994) this Court ordered an unlawfully cancelled Solicitation re-instated, thereby

returning that procurement process to the status quo ante any illegality. A remand of this Civil Action to the United States Court of Federal Claims with direction to Declare that the only Competitive Proposal which may be selected for Award of the Contract proposed by this Solicitation is the Precision Images Competitive Proposal will here accomplish just the same thing.

To make Precision Images whole, the Air Force must bear the cost of extracting the Award to GE Inspection Technologies and this is clearly reflective of Congressional judgment, a judgment reflected in 31 U.S.C. § 3554(b)(2). *Burnside-Ott Aviation Training Center, Inc. v. Department of the Navy*, No. 88-3056 (D.D.C. Nov. 4th, 1988), *1988 U.S. Dist. LEXIS 17606, *12*. The Air Force Contracting Officer can then decide whether or not to accept Precision Images' Price, a Price, as it turns out, which is $765,545 less than the Price the Air Force Contracting Officer has already agreed to pay for instruments of identical technical merit. If her judgment is that the Precision Images Price is not worth this substantial Price advantage, then the Air Force can cancel Solicitation Number FA8533-07-R-11523 and pay Precision Images its proposal preparation costs, 28 U.S.C. § 1491(b)(2).

Respectfully submitted,

/s/ Cyrus E. Phillips, IV

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PROOF OF SERVICE.

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Tuesday, March 25th, 2008 he caused to be sent, by overnight delivery, expenses prepaid, two copies of the foregoing Reply Brief of Plaintiff-Appellant Precision Images, LLC to counsel for the United States at the following address:

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/s/ Cyrus E. Phillips, IV

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Cyrus E. Phillips, IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B)(ii), the undersigned hereby certifies, under the penalty of perjury, that this Reply Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Reply Brief is set in face 14-point or larger; and that this Reply Brief contains no more than 7,000 words, *viz.*, that it contains 3,162 words out of 323 lines and 17,542 characters. I make this representation based on "Word Count," as presented on the "Tools" menu in Microsoft® Office Word 2003 (11.8202.8202) SP3.

/s/ Cyrus E. Phillips, IV

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